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SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1941

No. 617

VERNON J. BROWN, THEODORE I. FRY, HARRY F. KELLY, and LOUIS M. NIMS, comprising the MICHIGAN STATE BOARD OF TAX ADMINISTRATION, and VERNON J. BROWN, as Auditor General of the State of Michigan, THEODORE I. FRY, as State Treasurer of Michigan, HARRY F. KELLY, as Secretary of State for Michigan, and LOUIS M. NIMS, as Managing Director of said STATE BOARD OF TAX ADMINISTRATION,
Petitioners,
v.
J. B. SIMPSON, INC., an Illinois corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

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PRINTERS - LITHOGRAPHERS - BOOKBINDERS
LANSING — 1941

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners herein [comprising the Michigan State Board of Tax Administration charged with enforcement and administration of the Michigan 'Sales Tax Act' and 'Use Tax Act'] pray that a writ of certiorari issue to review a decree of the Supreme Court of the State of Michigan, entered on the 13th day of August, A. D. 1941, in a certain cause wherein the J. B. Simpson, Inc., an Illinois corporation [licensed as a foreign corporation

to do business in the state of Michigan], was plaintiff and appellee, as well as cross-appellant, and petitioners' predecessors in office were named as defendants, appellants and cross-appellees, modifying and affirming a decree of the circuit court for the county of Wayne [Michigan], in chancery, dated January 9, 1940, and by their counsel petitioners respectfully show:

I

Record References

The record upon which this petition is here presented is composed of the printed case as used in the Supreme Court of the State of Michigan [10 copies, Rule 38 (7)], with pages numbered 1 to 63, inclusive, and an additional record showing subsequent proceedings, printed with pages numbered 64 to 86, inclusive, and containing [1st] the opinion of the court and the opinion of the dissenting justices, [2nd] the decree of the court, entered August 13, 1941, and [3rd] an order of the court staying proceedings pending outcome of these proceedings, all as certified to this Court.

We also attach to this petition the following appendixes:

Appendix 'A', true copies of the statutes involved, *viz.:*

(1) the Michigan 'Sales Tax Act' [Act No. 167, Michigan Pub. Acts 1933, as amended,

(2) the Michigan 'Use Tax Act' [Act No. 94, Michigan Pub. Acts 1937 (the statute in controversy), and

(3) Act No. 327, § 94, Michigan Pub. Acts 1931, being a section of the Michigan 'General Corporation Act' (Michigan Stat. Ann., § 21.95).

Appendix 'B', the opinion of the Michigan Supreme Court rendering in companion causes, sustaining the constitutional validity of the Michigan 'Use Tax Act', and handed down contemporaneously with the opinion in the case of J. B. Simpson, Inc. [*Banner Laundering Co., et al, v. State Board of Tax Administration*].

II

Opinions of the Court Below

The foregoing opinions of the Michigan Supreme Court are officially reported as follows:

(a) the opinion in an earlier case, involving the Michigan 'Sales Tax Act', and upon which the lower court relied:

J. B. Simpson, Inc., v. O'Hara (1936), 277 Mich. 55 (also appears in the record, pp. 35-41, inclusive),

(b) the opinion, and the dissenting opinion, in the cause at bar, involving the Michigan 'Use Tax Act':

J. B. Simpson, Inc., v. State Board of Tax Administration (1941), 297 Mich. [Adv. sheets] 403; 298 N.W. [Adv. sheets] 81; and

(c) the opinion filed in the companion case, sustaining the Michigan 'Use Tax Act' as constitutional:

Banner Laundering Co., et al, v. State Board of Tax Administration [1941], 297 Mich. [Adv. sheets] 419; 298 N.W. [Adv. sheets] 73.

III

Summary Statement of the Matter Involved

We seek review of a decree of the Supreme Court of the State of Michigan (R 82) holding that, for the reasons set forth in its opinion (R 66), the Michigan 'Use Tax Act' imposes no duty or tax upon the respondent J. B. Simpson, Inc., an Illinois corporation.

That statute is said to complement the Michigan 'Sales Tax Act' by compensating the State for loss of revenues sustained because of lack of power to compute the sales tax upon interstate transactions,

J. B. Simpson, Inc., v. O'Hara [1936], 277 Mich. 55.

Outline of 'Sales Tax Act'

The Michigan 'Sales Tax Act' levies upon 'all persons engaged in the business of making sales at retail' an annual tax for the privilege of engaging therein, equal to three [3] per cent of the gross proceeds thereof [§ 2], computed and paid monthly on the basis of returns made by the taxpayer [§ 6].

> "The term 'sale at retail' means any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use other than for consumption or use in industrial processing or agricultural produc-

ing, or for any other purpose than for resale in the form of tangible personal property . . . .'' [§ 1 (b)].

''The term 'gross proceeds' means the amount received in money, credits, property or other money's worth in consideration of sales at retail within this state, . . .'' [§ 1 (g)].

All persons engaged in any business for which a privilege tax is imposed by the act are required to register with the authority created to enforce the act [§ 21], the state board of tax administration [§ 3], but such a taxpayer may reimburse himself by adding the tax to his sale price [§ 23].

Upon consideration of this act, the Supreme Court of the State of Michigan, in the earlier case heretofore cited,

J. B. Simpson, Inc., v. O'Hara [1936], 277 Mich. 55,

held that in plaintiff's transactions involving orders taken in Michigan subject to acceptance in Illinois, ownership of the property was transferred in the latter state upon delivery to an interstate carrier and, being interstate within the meaning of the commerce clause of the Federal Constitution, were not, nor could they be subject to the Michigan sales tax.

Outline of 'Use Tax Act'

The Michigan 'Use Tax Act' levies upon 'every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state, . . . which shall be equal to three [3] per cent of the price of such property' [§ 3].

It provides that the tax shall not apply to certain enumerated transactions, including

"(a) property the sale of which in this state has been subjected to the tax imposed by . . [the 'Sales Tax Act']. . .

(f) property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this act under the law of any other state of the United States: . . . ." [§ 4].

Section 5 of the act imposes upon sellers of tangible personal property certain duties in respect of the collection of the tax from the consumer or user thereof:—

"Sec. 5. Every seller of tangible personal property for storage, use or other consumption in this state, *engaged in the business of selling at retail in this state*, shall, within thirty [30] days after the effective date of this act, register with the board and give the name and address of each agent operating in this state, the location of any and all distribution or sales houses or offices, or other place of business in this state and such other information as the board [state board of tax administration] may require with respect to the enforcement of this act: *Provided*, That it shall not be necessary for a seller, holding a license obtained pursuant to the provisions of act number one hundred sixty-seven [167] of the public acts of nineteen thirty-three [1933] as amended [the 'Sales Tax Act'], to register with the board as provided in this act. Every such seller shall collect the tax imposed by this act from the consumer and the board may, by rule or regulation, authorize any other seller to collect such tax from the consumer, and such rule or regulation shall require that each such seller shall register with the board in such form as may be therein provided" [The phrase italicize d underscores plaintiff's claims, and was firmly stressed by the Michigan Supreme Court].

The act further provides that 'in case any seller who is required or authorized to collect the tax fails to do so,

he shall be liable personally for such amount as he failed to collect' [§ 9].

The term 'seller' is defined by the statute to mean

> "the person from whom a purchase is made and includes every person engaged in this state or elsewhere in the business of selling tangible personal property for storage, use, or other consumption in this state; and when, in the opinion of the board, it is necessary for the efficient administration of this act to regard any salesman, representative, peddler or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates or from whom he obtains tangible personal property, sold by him for storage, use or other consumption in this state, irrespective of whether or not he is making such sales on his own behalf, or on behalf of such dealer, distributor, supervisor, or employer, and board may so regard him and may regard such dealer, distributor, supervisor, or employer as the 'seller' for the purpose of this act" [§2 (d)].

And 'business' is defined to mean 'all activities engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect' [§ 2 (h)].

The Facts

The facts are undisputed, it having been stipulated that they are found and set forth in the opinion of the Michigan Supreme Court,—*J. B. Simpson, Inc. v. O'Hara* [1936], 277 Mich. 55 (R 35-41).

As briefly stated by Mr. Justice Wiest, who wrote the controlling opinion in the case,

> "plaintiff operates a merchant tailoring establishment in Chicago, Illinois, takes order in this state,

from residents, for clothes, fills such orders in Chicago and, upon delivery there to an interstate carrier, title thereto is vested, by agreement, in the purchaser" (R 66).

The following additional facts, correctly summarized by Mr. Justice Boyles in his dissenting opinion, should also be considered:

> "Plaintiff is an Illinois corporation selling men's tailoring apparel in Michigan, mantains a branch office in Detroit where samples are kept and sometimes displayed, operations of salesmen are supervised, an office staff maintained, bushelmen are employed to make alterations, collections of unpaid balances are made and deposited in a Detroit bank subject only to withdrawals by Illinois checks. At plaintiff's branch office in Detroit samples of cloth and sample suits are exhibited, salesmen take measurements and orders and accept down-payments. Plaintiff there has a telephone listing and address as 'SIMPSON J B INC tlrs' and an advertisement under the same name in the telephone book. Orders for goods are solicited in Michigan, received by the Detroit branch, and forwarded to Chicago, subject to acceptance in Illinois. No credit is extended, balance of the purchase price is collected from customers upon delivery. Plaintiff has been authorized to do a tailoring business in Michigan as a foreign corporation, and is paying its fees as a foreign corporation for the privilege of engaging in business in Michigan" (R 72).

Plaintiff filed in the cause at bar, in the trial court, a bill of complaint against the Michigan state board of tax administration and others for a declaratory judgment regarding the rights of plaintiff under the Michigan 'Use Tax Act' and for injunctive relief, alleging [among other things] that its business

"is such that it is not and may not be charged with any duty or obligation in respect to said Use Tax Law or use tax; plaintiff is not and may not be required to register thereunder, to file any returns thereunder, to collect any sums from its customers on account thereof. . . . . The State of Michigan and the legislature of the State of Michigan have no power, authority or jurisdiction to impose any such duties or obligations upon plaintiff. No such duties or obligations are imposed upon plaintiff by the terms of said act, but if they were, then the property sold by plaintiff to Michigan customers would be exempt . . . . under the act" (R 11, 12).

It further alleged that if the use tax act should be construed to impose duties or obligations upon plaintiff,

"Then it contravenes and is repugnant to the Constitution of the United States, and by way of illustration . . . . . (c) it imposes a direct burden upon, and a regulation of, commerce of the several States, contrary to the provisions of Article 1, sections 7 and 8 of the Constitution of the United States" (R 12).

The plaintiff prayed that the court might

"find, declare and decree that plaintiff is not subject to the provisions of said Act 94 [the 'Use Tax Act'] and may not be made subject thereto; that plaintiff, its officers, directors, agents and employees are not obliged or required to comply with the said Act or the provisions thereof; that the business transacted by plaintiff is not such as subjects plaintiff, its officers, directors, agents and employees to any obligations or duties in respect of said act; that said act is not a valid exercise of the taxing power of the State of Michigan and is unconstitutional, null and void if construed and applied to plaintiff, the property sold by plaintiff, or the business transacted by plaintiff" (R 15, 16).

Companion Cases

Contemporaneously therewith, companion bills of complaint were filed, by the same counsel, in behalf of others affected by the use tax, for declaratory judgments of unconstitutionality of the Michigan 'Use Tax Act' and for injunctive relief alleging, among other averments, that the statute in question transgresses the commerce clause of the Federal Constitution (Article 1, § 8). In all, approximately 29 of these actions were thus instituted, but three [3] typical cases were appealed to the Supreme Court of the State of Michigan [*Banner Laundering Co. v. State Board of Tax Administration; Ford Building Co. v. Same; Sills v. Same*, 297 Mich. 419; 298 N.W. 73].

Trial Court's Decision & Decrees

All of the 'Use Tax Cases', including the cause at bar, were simultaneously submitted to the trial court under a 'Stipulation of Facts' (R 26), and an opinion was filed by the trial jurist, covering all cases before him (R 41-52).

In the cases of the *Banner Laundering Company* and other users or consumers of personal property subject to the use tax, as well as in the case at bar [the *J. B. Simpson, Inc. Case*], the court held and later decreed that the 'Use Tax Act' of Michigan was valid as against the objections raised by the several plaintiffs, including that based upon the commerce clause of the Federal Constitution (R 48, 49).

Concerning the cause at bar, the trial court said:

> "This brings us to the condition which this act imposes upon plaintiff J. B. Simpson, Inc. This plaintiff has already been before this court with respect to the application of the Sales Tax Act as to its

business in the State of Michigan, and our Supreme Court, in the case of *J. B. Simpson, Inc., vs. O'Hara*, 277 Mich. 55, held that the plaintiff was not subject to the sales tax, and also held in that case because the work was done in Illinois and the orders accepted in that state, that the title to the clothing passed to the purchaser in the state of Illinois when the delivery was made to the carrier at Chicago, and therefore such a sale was not made in Michigan, but in Illinois, and being interstate commerce, could not be taxed by the State of Michigan.

Conditions imposed by this record have not changed from the matters and things set forth in *Simpson v. O'Hara, supra*, therefore in view of that decision, I find that this act does not impose any duty or tax upon such plaintiff".

A decree was entered in conformity with the foregoing opinion (R 56-60).

Appeals to Supreme Court

The state board of tax administration claimed and perfected an appeal from this decree, to the Supreme Court of the State of Michigan (R 60), assigning as error that (1) the court erred in holding that Act 94, Public Acts of 1937 [the 'Use Tax Act'] does not impose any duty or tax upon J. B. Simpson, Inc., and (2) the court erred in holding that J. B. Simpson, Inc., was and is conducting business in interstate commerce and was not and is not engaged in the business of selling tangible personal property at retail in Michigan (R 1).

Plaintiff J. B. Simpson, Inc., filed claim of cross-appeal (60), averring that the trial court erred, among other things,

"3. In failing and refusing to find and adjudge that said Act 94 of the Public Acts of 1937, as amend-

ed [the 'Use Tax Act'], contravenes and is repugnant to

(c) Article 1, Section 8, of the Constitution of the United States" (R 2).

In the cases of *Banner Laundering Co., et al,* the Michigan Supreme Court affirmed the lower court's decree, and held that, as against any of the reasons urged by appellants, the act is constitutional. And that, so far as concerned objections based upon the commerce clause of the Federal Constitution, such objections were foreclosed by several recent decisions of this Court, among those cited being

Henneford v. Silas Mason Co., 300 U.S. 577
Felt & Tarrant Co. v. Gallagher, 306 U.S. 62.

In the Case of *J. B. Simpson, Inc.* [the cause at bar], the Supreme Court affirmed the circuit court decree and modified that order by declaring that it found 'no occasion to touch upon the constitutionality of the act, and as there was none necessary in the circuit court, so much of the decree below as deals with constitutionality of the act is eliminated, and the question left without decision to await a proper setting' [R 69]. Notwithstanding this statement, however, it is our position that the court's decision, taken as a whole, was largely controlled by constitutional principles and, in effect, held that the Michigan 'Use Tax Act', as construed by the court, and applied to J. B. Simpson, Inc., transgressed the commerce clause of the Constitution of the United States [Article 1, § 8].

IV

Jurisdictional Statement

The following statement particularly discloses the basis upon which it is contended that this Court has jurisdiction upon certiorari to review the decree in question:

(a) The statutory provision believed to sustain the jurisdiction is § 237 (b) of the Federal Judicial Code [28 USCA, § 344 (b),—28 FCA, § 344 (b)], as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity . . . . of a statute of any State on the ground of its being repugnant to the Constitution . . . . . of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . . . of the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied . . ." [quoting only so much of the paragraph as is pertinent to the issue].

We also rely on the following portion of Court Rule 38, paragraph 5, which provides in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion,

indicate the character of reasons which will be considered:

(a) Where a State court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court".

(b) The statute of the State of Michigan, the validity of which is involved [and which the court interpreted and construed, as well] is the 'Use Tax Act' of that State, Act 94, Public Acts of Michigan, 1937 [Appendix 'A' (2)].

(c) The date of the decree sought to be reviewed was the 13th day of August, 1941, and the approximate date upon which this petition for certiorari is presented is the 17th day of September, 1941.

(d) The following cases are believed to sustain the jurisdiction,

Southern R. Co. v. Clift, 260 U.S. 316, 319,
Sterling v. Constantin, 287 U.S. 378,
Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 98,

and it is our contention that the State court decided a federal question of substance in a way probably not in accord with the following applicable decisions of this Court:

Henneford v. Silas Mason Co., 300 U.S. 577,
Felt & Tarrant Co. v. Gallagher, 306 U.S. 62,
Southern Pacific Co. v. Gallagher, 306 U.S. 167,
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33,
McGoldrick v. Felt & Tarrant Co., 309 U.S. 70.

(e) The grounds upon which it is contended the questions involved are substantial, are as follows:

[1] If, as we surmise, the State court, while construing the Michigan 'Use Tax Act', held, in effect, that the nature of plaintiff's business was wholly interstate, and that, because of the commerce clause, the State of Michigan could not compel J. B. Simpson, Inc., to collect the tax from its Michigan customers, then the question presented involves a substantial amount of State revenue.

[2] If, as we think, the State court's decision on a federal question was not in accord with applicable decisions of this Court rendered subsequent to the opinion of the Michigan Supreme Court in *J. B. Simpson, Inc., v. O'Hara*, 277 Mich. 55 [upon which the Michigan court relied], this Court has jurisdiction to correct the error by giving to the Michigan 'Use Tax Act' like force, effect and validity as it accorded the 'Use Tax Act' of California,

Felt & Tarrant Co. v. Gallagher, 306 U.S. 62.

(f) The stage of the proceedings in the court of first instance, and the appellate court, at which, and the manner in which the federal questions sought to be reviewed were raised, the method of raising them, and the way they were passed upon by the court appears in the summary statement of the matter involved, and need not be repeated here.

V

Questions Presented

The questions presented in this case are as follows:

1. Would the Michigan 'Use Tax Act', as construed by the highest court of that State in the case at bar, and as sought to be applied to the respondent, J. B. Simpson, Inc., place unconstitutional burdens on interstate commerce, in violation of the commerce clause of the Federal Constitution [Article 1, § 8]?

2. May the Michigan legislature constitutionally compel a foreign corporation engaged in commerce between Illinois and Michigan,—conducting no intrastate business, as such, in Michigan, but licensed to do business and maintaining a branch office and employing salesmen to solicit orders in that state, subject to acceptance and delivery of the goods to an interstate carrier in Illinois [in the circumstances set forth in our summary statement and the record],—to collect from its Michigan customers, and pay to the State of Michigan, the tax imposed upon users and consumers of personal property by the Michigan 'Use Tax Act'?

3. Does the earlier decision of the Michigan Supreme Court rendered in *J. B. Simpson, Inc., v. O'Hara* [1936], 277 Mich. 55 [holding that, because of the commerce clause of the Federal Constitution, J. B. Simpson, Inc., is not subject to the tax imposed by the Michigan 'Sales Tax Act'] bar this Court from reviewing a subsequent Michigan decision involving the Michigan 'Use Tax Act', enacted after decisions in

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62,
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33,
McGoldrick v. A. H. Dugrenier, Inc., 309 U.S. 70,
Jagels v. Taylor, 309 U.S. 619 [affirming 280 N.Y. 766],
Nelson v. Sears, Roebuck & Co., 312 U.S. 359, and
Nelson v. Montgomery Ward & Co., 312 U.S. 373,

sustaining statutes of import similar to those of Michigan? In other words, may not this Court consider the 'Use Tax Act' of Michigan untrammeled by the doctrine of res judicata?

VI

Reasons Relied on for Allowance of Writ

[Assignments of Error]

The reasons relied on for allowance of the writ of certiorari are that the Supreme Court of the State of Michigan erred in holding:

First: That the Michigan 'Use Tax Act', as construed by the court, and as sought to be applied to the respondent J. B. Simpson, Inc., would place unconstitutional burdens on interstate commerce, in violation of the commerce clause of the Federal Constitution [Article 1, § 8].

The court say:

> "In the case at bar the State seeks to impose a burden on interstate commerce not in any manner connected with intrastate commerce, and this may not be done. Plaintiff needed no authorization to do

> business in the course of interstate commerce in this state, and leave to do business in this state, unless an intrastate business is carried on and the intrastate and interstate business become associated, does not subject interstate commerce to any State-imposed burden".

Second: That the Michigan legislature constitutionally may not compel a foreign corporation engaged in commerce between Illinois and Michigan,—conducting no intrastate business, as such, in Michigan, but licensed to do business and maintaining a branch office and employing salesmen to solicit orders in that state, subject to acceptance and delivery of the goods to an interstate carrier in Illinois [in the circumstances set forth in our summary and the record],—to collect from its Michigan customers, and pay to the State of Michigan, the tax imposed upon users and consumers of personal property by the Michigan 'Use Tax Act'.

The court say:

> "Sanction of the claim made by the State would make plaintiff a collector of a tax, in behalf of the State, upon merchandise, manufactured, sold and, in the course of interstate commerce, delivered in Chicago for carriage to owners thereof in the State of Michigan, and such cannot be done, for the law-making arm of the legislature, and much less that of mere administrative officials, cannot reach into another State and mandate persons there to so serve. The use tax act does not accomplish any such thing".

Third: That under the doctrine of res judicata, the Supreme Court of the State of Michigan was bound by its own decision rendered in the earlier case of *J. B. Simpson, Inc., v. O'Hara* [1936], 277 Mich. 55 [rather than by subsequent decisions of this court], the court saying:

"Under the mentioned Federal decisions, a foreign corporation doing business within this State, subject to the sales tax, is liable for the use tax upon goods shipped into the State to residents as, in such case, the use tax is complementary as associated with the sales tax and not considered a burden upon what would otherwise be interstate commerce. The business here involved, upon which the State seeks to sustain the use tax, is the very business which we held, in *J. B. Simpson, Inc., v. O'Hara, supra,* was not subject to the sales tax, and upon that point that decision is res judicata. So dissociated, the business is strictly interstate commerce upon which the State may not impose the burden of the use tax or compel plaintiff to collect the same".

Fourth: That J. B. Simpson, Inc., did not sell merchandise at retail in the state of Michigan.

The court say:

"Here the plaintiff made no sales in this state subject to the sales tax. *J. B. Simpson, Inc., v. O'Hara, supra.* See, also, *Montgomery Ward & Co. v. Fry,* 277 Mich. 260. Merchandise was purchased by residents of Michigan from plaintiff in Illinois, with title passed in that state to the purchaser under express contract consummated in the state of Illinois. Plaintiff did not maintain retail stores nor sell merchandise at retail in this state, and such fact brings the case within the following exception noted in *Nelson v. Sears, Roebuck & Co., supra*:

'Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out-of-State mail order houses which need not and do not collect the tax on their Iowa sales.

> But those other concerns are not doing business in the State as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price' ".

Fifth: That the decree in the circuit court, restraining defendants from exacting the asserted use tax from plaintiff, be affirmed.

Sixth: That the tax paid by plaintiff and impounded by order of the circuit court be released to plaintiff as owner thereof.

Seventh: That the Michigan 'Use Tax Act' does not impose any duty or tax upon the respondent J. B. Simpson, Inc.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Michigan, commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings of said supreme court in the case numbered and entitled on its docket, No. 4, October Term, 1940, J. B. Simpson, Inc., an Illinois corporation, Plaintiff-Appellee, and Cross Appellant, v. Michigan State Board of Tax Administration, Defendant-Appellants, to the end that the opinion and decree of said supreme court may be reviewed and reversed by this Honorable Court, and that a decree may be entered for these petitioners.

VERNON J. BROWN, and others,
as MICHIGAN STATE BOARD
OF TAX ADMINISTRATION
by HERBERT J. RUSHTON,
Attorney General of the State
of Michigan,
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For Petitioners.

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1941

No.....

VERNON J. BROWN, THEODORE I. FRY, HARRY F. KELLY, and LOUIS M. NIMS, comprising the MICHIGAN STATE BOARD OF TAX ADMINISTRATION, and VERNON J. BROWN, as Auditor General of the State of Michigan, THEODORE I. FRY, as State Treasurer of Michigan, HARRY F. KELLY, as Secretary of State for Michigan, and LOUIS M. NIMS, as Managing Director of said STATE BOARD OF TAX ADMINISTRATION, Petitioners,

v.

J. B. SIMPSON, INC., an Illinois corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF CASE

The facts of this case are stated adequately in the petition for certiorari.

The immediate question for decision is whether this Court has probable jurisdiction to grant the review sought by the State of Michigan.

It may be conceded that the state court construed the Michigan 'Use Tax Act', that we are bound thereby, and

if the decision rendered below turned entirely upon this or any other non-federal point, the writ of certiorari should be denied.

We respectfully submit that the court, after interpreting the local statute, was still of the opinion that, because of the commerce clause of the Federal Constitution, the 'Use Tax Act' could not be applied to the respondent.

Our position, then, is that the Michigan 'Use Tax Act', as construed by the state court, nonetheless, and without interference with interstate commerce, imposes upon respondent the duty to collect the tax levied upon its Michigan buyers.

II

ARGUMENT

POINT ONE

The Michigan 'Use Tax Act', as construed by the state court, and as sought to be applied to J. B. Simpson, Inc., places no burden on interstate commerce.

The state court, in companion cases decided the same day, held that the use tax is not upon interstate commerce, but upon the privilege of use after the commerce is at an end, hence is not a transgression of the power of congress to regulate interstate commerce,

Banner Laundering Co. v. State Board of Tax Administration, 297 Mich. 419, 298 N.W. 73.

In the *Simpson case* [the cause at bar], the state court held the language of the act to mean that the only sellers charged with the duty of collecting the tax were those 'engaged in the business of selling at retail in this state' [§ 5, 'Use Tax Act'].

The State takes the position that, even so construed, the Michigan 'Use Tax Act', as sought to be applied to respondent, imposes no burden on interstate commerce.

We maintain that recent decisions of this Court, to that general effect, control,

> *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62,
> *So. Pac. Co. v. Gallagher,* 306 U.S. 167,
> *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U.S. 33,
> *McGoldrick v. Felt & Tarrant Mfg. Co.* 309 U.S. 70,
> *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, and
> *Nelson v. Montgomery Ward & Co.,* 312 U.S. 573.

POINT TWO

Since it is admitted to do business, maintains a branch office, and employs salesmen in this State to solicit orders from Michigan residents, J. B. Simpson, Inc., constitutionally may be compelled to collect from its Michigan customers the tax imposed upon them by the 'Use Tax Act'.

The facts submitted to the Court closely parallel those involved in the California 'Use Tax Case',

> *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62.

There, as here, an Illinois corporation was engaged in manufacturing and selling articles of trade in that state

and delivering them to purchasers in various parts of the Union.

It employed agents in the state of California, paying them on a commission basis and paying the rent of an office for each general agent. As this court said,

> "All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff . . ."

Again,

> "As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside the state. Sometimes machines are forwarded directly to the purchaser, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as demonstrators. *Plaintiff has never qualified to do intrastate business in California*". [Emphasis, ours].

On the basis of such facts, the California 'Use Tax Act', directing 'retailers maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption therein, to collect from the purchaser the tax imposed', was sustained by this Court.

We respectfully submit that the *Felt & Tarrant* case controls the questions presented in this cause by the petition for writ of certiorari.

POINT THREE

[A] Although the state court construed the Michigan 'Use Tax Act', it based decision upon the 'commerce clause', and hence probability of jurisdiction is indicated.

The duty of collecting the use tax in Michigan is placed upon 'every seller .... engaged in the business of selling at retail in this state' [§ 5].

Section 2 [d] of the act defines the term 'seller' to mean 'the person from whom a purchase is made and includes every person engaged in this state *or elsewhere* [Italics, ours] in the business of selling tangible personal property for storage, use, or other consumption in this state'.

The court held this definition to be without force in the present instance 'for the quoted enactment, by its specific terms, only applies to sellers of "tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state".

Accepting as final this judicial interpretation of § 5 of the Michigan 'Use Tax Act', limiting its application to those 'engaged in the business of selling at retail in' that state, it nonetheless appears that the court's decision was largely, if not entirely, controlled by constitutional principles and, more especially, the commerce clause.

[B] The earlier decision upon which the state court relied [J. B. Simpson, Inc. v. O'Hara, 277 Mich. 55], is 'probably not in accord with (subsequent) applicable decisions of this Court' [Rule 38, par. 5 (a)].

In the first case of *Simpson*, 277 Mich. 55, 59, the court held that the Simpson corporation was not liable for the sales tax because, as was then said,

> "Both by the language of the statute and the terms of the order, the parties contemplate that the title to the clothing passes in the State of Illinois when delivery is made to the carrier at Chicago. Such a sale is not made in Michigan but in Illinois and being interstate commerce cannot be taxed by the State of Michigan".

The argument 'that failure to tax such transactions imposes a discriminatory handicap upon the local merchants of the state' was rejected on the ground that it had 'long since been answered and disposed of in *Robbins v. Shelby Taxing District*, 120 U.S. 489'.

Speaking of the *Robbins* case, the supreme court of appeals of Virginia has observed:

> "In recent years, there has been a gradual relaxation and modification of the strict and narrow interpretation applied in the above case as to the purpose of the commerce clause. The decisions in many of the later cases are predicated upon the presence or absence of discrimination.
>
> Finally, the Supreme Court of the United States has declined to deny to the States the right to levy a tax upon interstate commerce merely because it is such commerce. The latest cases recognize and admit the right of the States to require such commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such

right may, in some measure, affect the commerce or increase the cost of doing business. They declare that the purpose of the commerce clause is to allow interstate commerce to compete on a fair and equal basis with local commerce",

Dunston v. City of Norfolk (Va., 1941), 15 S.E. [2d], 86, 88.

In *Nelson v. Sears, Roebuck & Co., supra,* the respondent pointed to the fact that in its mail order business it was in competition with out-of-state mail order houses 'which need not and do not collect the tax on their Iowa sales'. This Court say:

"But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price".

Respondent in the case at bar has been licensed to do business in the state of Michigan; it maintains a branch office at which orders are received, the purchaser is measured for a suit of clothes, samples are kept, and bushelmen made minor alterations; it employs salesmen to solicit orders for clothing; and it has a local Michigan bank account in which are deposited moneys collected as payment for its merchandise, and upon which the main office at Chicago draws as it sees fit.

III

CONCLUSION

We respectfully submit that, because of the importance of the questions involved, the writ of certiorari should issue.

Respectfully submitted,

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EDMUND E. SHEPHERD,
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APPENDIX 'A' [(1) and (2)]

Note: The pamphlet which follows [Exhibit A (1) and (2)] embodies the provisions of the Michigan 'Sales Tax Act' and its complementary measure, the 'Use Tax Act' of that State.

1939

STATE OF MICHIGAN

SALES TAX ACT

Act 167, P. A. 1933, as Amended

USE TAX ACT

Act 94, 1937, P. 129; Eff. Oct. 29, 1937

Compiled under the supervision of

State Board of Tax Administration

FRANKLIN DEKLEINE COMPANY
PRINTERS • LITHOGRAPHERS • BOOKBINDERS
LANSING — 1940

PUBLIC ACTS 1933, NO. 167, AS AMENDED.

An Act to provide for the raising of additional public revenue by prescribing certain specific taxes, fees, and charges to be paid to the state for the privilege of engaging in certain business activities; to provide, incident to the enforcement thereof, for the issuance of licenses to engage in such occupations; to provide for the ascertainment, assessment and collection thereof; to appropriate the proceeds thereof; to establish a state board of tax administration; to make an appropriation for carrying out the provisions of this act; and to prescribe penalties for violations of the provisions of this act.

The People of the State of Michigan enact:

General sales tax act; definitions. Section 1. Definitions. That when used in this act:

(a) The term "person" includes any individual, firm, co-partnership, joint adventure, association, municipal or private corporation whether organized for profit or not, company, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) The term "sale at retail" means any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use other than for consumption or use in industrial processing or agricultural producing, or for any other purpose than for resale in the form of tangible personal property: *Provided, however,* That tangible personal property permanently affixed and becoming a structural part of real estate shall not be considered as consumed or used in industrial processing or agricultural producing. The term "sale at retail" includes conditional sales, installment lease sales and any other transfer of such property when the title is retained as security for the purchase price but is intended to be transferred later. The term "sale at retail" shall not include an isolated transaction in which any tangible personal property is sold, transferred, offered for sale, or delivered by the owner thereof, or by his representative for the owner's account, such sale, transfer, offer for sale or delivery not being made in the ordinary course of repeated and successive transactions of a like character by such owner or on his account by such representative.

(c) The term "sale at retail" shall not include tangible personal property, commonly known as commercial advertising when produced upon special order of the purchaser.

(d) The term "sale at retail" shall not include vessels designed for commercial use of registered tonnage of 1,000 tons or more when produced upon special order of the purchaser.

(e) The term "sale at retail" includes sales of electricity, natural and/or artificial gas and steam when made to the consumer or user for consumption or use rather than for resale: *Provided, however,* That the term "sale at retail" shall not include the sale of water through water mains.

(f) The provisions of subsection (b) of section 1 of this act, as amended, shall be construed as declaratory of the intention of the legislature in the enactment of Act No. 167 of the Public Acts of 1933, and the state board of tax administration shall not collect or receive any tax upon the gross proceeds of any sales not taxable under this act as amended.

(g) The term "gross proceeds" means the amount received in money, credits, property or other money's worth in consideration of sales at retail within this state, without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Credits or refunds for returned goods may be deducted: *Provided, however,* That after original sale at retail of tangible property, upon which the full tax has been paid, when used tangible personal property of like kind and nature is taken in exchange or part payment of the consideration of a sale at retail, and such property is, or is to be held by the taxpayer for the purpose of resale in the form of personal property, the credit allowed on account of such trade-in shall not be included as part of the gross proceeds of sale: *Provided,* That said taxpayer shall be liable for the privilege tax, imposed under this act, on the full credit allowed, such liability to attach at the time of the resale of the property, so taken, and the resale of said property shall be considered a sale at retail under the provisions of this act.

(h) The term "business" includes all activities engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

(i) The term "tax year" or "taxable year" means the fiscal year of the state of Michigan or the taxpayer's fiscal year when permission is obtained by him from the board to use his fiscal year as the tax period in lieu thereof.

(j) The word "board" means the state board of tax administration of the state of Michigan as herein created.

(k) The word "taxpayer" means any person liable for any tax hereunder.

(l) The word "tax" shall include all taxes, interest or penalties levied under this act.

Am. Act 313, 1939.
GROSS PROCEEDS: Montgomery Ward & Co. v. Fry, 277 Mich. 260; Standard Oil Co. v. Michigan, 283 Mich. 85.
NATURE OF TAX: Montgomery Ward & Co. v. Fry, 277 Mich. 260; City of Wyandotte v. State Board of Tax Administration, 278 Mich. 47.
SALE AT RETAIL: See Boyer-Campbell Co. v. Fry, 271 Mich. 282; Montgomery Ward & Co. v. Fry, 277 Mich. 260; Wurlitzer Co. v. State Board of Tax Administration, 281 Mich. 558.
PERSON DEFINED: City of Wyandotte v. State Board, 278 Mich. 47.

Imposition of tax, rate, effective date. Sec. 2. Imposition of the tax. There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as hereinbefore defined, an annual tax for the privilege of engaging in such business equal to 3 per cent of the gross proceeds thereof, less deductions allowed in section 4.

Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or

profession not taxable under this act, shall keep books to show separately the transactions used in determining the tax herein levied. In the event of such person failing to keep such separate books, there shall be levied upon him a tax based upon the entire gross proceeds of both or all of his businesses.

The tax hereby imposed shall be payable from and after June 30, 1933.

Licenses required for taxed businesses; bond. Sec. 3. Licenses required for taxed businesses; bond. If any person after the thirtieth day of June, 1933, shall engage or continue in any business for which a privilege tax is imposed by this act, he shall under such rules and regulations as the board shall prescribe, apply for and obtain from the board, upon the payment of a registration fee of $1.00, a license to engage in and to conduct such business for the current tax year; if said applicant taxpayer shall have at any time failed, refused or neglected to pay any tax or interest or penalty upon any tax, or shall have attempted to evade the payment of any tax or interest or penalty upon any tax by means of petition in bankruptcy, or if applicant taxpayer shall be a corporation and the board shall have reasons to believe that the management or control of said corporation is under any person or persons who shall have failed to pay any tax or interest or penalty upon any tax within the purview of this section as above set forth, then it shall be the duty of the board to require a surety bond payable to the state of Michigan, upon which said applicant taxpayer shall be the obligor, in a sum of not less than $1,000.00 nor more than $25,000.00, conditioned that the applicant taxpayer shall comply with the provisions of this act and will promptly file true reports and pay the taxes, interest and penalties provided for or required by this act, which bond shall be approved as to the amount and surety by the board: *Provided,* That said applicant taxpayer may in lieu of said surety bond deposit a sum of money with said board in such amount as the board shall determine, to guarantee the payment of the tax and/or interest and/or penalty and compliance with this act, but the amount so determined by the board shall not exceed the estimated tax payable during a 2 months period; and he shall thereby be duly licensed to engage in and conduct such business. The board may require said applicant taxpayer to furnish such other and further bond as it shall deem necessary, from time to time, within the limits in this section hereinbefore set forth, on the giving of 30 days' notice in writing. Said license shall expire on the last day of the tax year next succeeding the date of its issuance and shall be renewed annually upon the condition that he shall pay the aforesaid registration fee and the tax accrued to the state under the provisions of this act. No person shall engage or continue in any business taxable hereunder without securing a license.

Am. Act 180, 1939.

Deductions. Sec. 4. Deductions. (a) In computing the amount of tax levied under the provisions of this act for any month, the taxpayer may deduct from the gross proceeds taxable under this act, the sum of $50.00. Every person exercising any privilege taxable hereunder for any fractional part of a month shall be entitled to a deduction of that part of the sum of $50.00 which bears the same proportion to the total

sum that the period of time during which such person is engaged in such business bears to a whole month.

(b) No person subject to a tax under this act need include in the amount of his gross proceeds used for the computation of the tax any proceeds of his business derived from sales to the United States, the state of Michigan, its departments or institutions, or any of its subdivisions, or any proceeds of his business which are exempt from taxation by reason of the provisions of the constitution of the United States or the constitution of Michigan, and as a consumer, the United States, the state of Michigan, its departments or institutions, or any of its subdivisions for their own consumption, shall not be liable for the payment of the tax.

Am. Act 313, 1939.

Deductible sales. Sec. 4a. No person subject to tax under this act need include in the amount of his gross proceeds used for the computation of the tax any sales not for resale to:

(a) Schools or other educational institutions not operated for profit.

(b) Hospitals not operated for profit.

(c) Incorporated homes for the care or maintenance of children or aged persons not operated for profit.

(d) Regularly organized churches or houses of religious worship, excepting such as are mainly commercial enterprises.

Sales of school books and food to bona fide enrolled students by schools or other educational institutions not operated for profit are exempt from the operation of this act.

Added Act 77, 1935.
Am. Act 313, 1939.

Additional tax. Sec. 5. Additional tax. The tax imposed by this act shall be in addition to all other license fees and taxes levied by law as a condition precedent to engaging or continuing in any business taxable hereunder, except as in this act otherwise specifically provided.

Tax; due date; monthly return, payment. Sec. 6. Monthly return; computation of tax; payment. The taxes levied hereunder shall be a personal obligation of the taxpayer and shall be due and payable on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer shall, on or before the fifteenth day of each month, make out a return for the preceding month in the form required by the board, showing the amount of the tax for which he is liable, and he shall mail the return, together with a remittance for the amount of the tax, to the office of the board, on or before the fifteenth day of the month. Such monthly return shall be signed by the taxpayer or his duly authorized agent.

Am. Act 313, 1939.

Annual returns; payment of tax; extension of time; fiscal year. Sec. 7. Annual return; payment of tax after end of tax year. On or before 30 days after the end of the tax year each person liable for the payment of a tax under this act shall make an annual return in the form required by the board, showing the total gross proceeds of his business for the preceding tax year, and showing the amount of tax payable by him under this act, and, after deducting the amount of the monthly payments

made during such tax year, he shall transmit the return to the board with his remittance covering the residue, if any, of the tax payable by him for the preceding tax year. Such return shall be verified by the oath of the taxpayer, or his duly authorized agent. The board, for good cause shown, may extend the time for making the annual return on the application of any taxpayer. The board shall, on application of any taxpayer, permit him to use as the tax year for the purposes of this act the fiscal year used in the ordinary course of his business instead of the fiscal year of the state of Michigan.

Consolidated returns. Sec. 8. Consolidated returns. Any person engaging in 2 or more places in the same business or businesses taxable under this act, shall file a consolidated return covering all such business activities engaged in within this state and shall be entitled to deduct 1 exemption only in the amount of $50.00 per month as allowed in section 4.

Am. Act 313, 1939.

Determination of tax; excess payment, deficiency assessments; notices. Sec. 9. Examination of returns; determination of tax; deficiency assessments. As soon as practicable after each return is filed the board shall examine it. If it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed and the correct tax determined. If the amount paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess so paid with interest at 4 per cent per annum may be credited against a subsequent tax or shall be refunded if requested by the taxpayer.

If the amount paid is less than the amount which should have been paid, the deficiency, together with interest thereon at the rate of one-half of 1 per cent per month from the time the tax was due, shall become due and payable after notice and hearing as herein provided.

If any part of the deficiency is due to negligent or intentional disregard of this act or of authorized rules and regulations of the board, but without intent to defraud, there shall be added as a penalty 10 per cent of the total amount of the deficiency in the tax, and interest shall be collected at the rate of 1 per cent per month on the amount of such deficiency in the tax from the time it was due, which interest and penalty shall become due and payable after notice and hearing as hereinafter provided.

If any part of the deficiency is due to a fraudulent intent to evade the tax, then there shall be added as a penalty 100 per cent of such deficiency and, in such a case, the whole amount of tax unpaid, together with the penalty, shall become due and payable after notice and hearing as hereinafter provided, and an additional 1 per cent per month on the tax shall be added from the date such tax was due until paid.

Whenever notice is required under the provisions of this act, such notice shall be given either by personal service or by registered mail addressed to the last known address of the taxpayer.

No deficiency, interest or penalty shall be assessed for any year after the expiration of 3 years from the date set for the filing of the annual return for such year.

Am. Act 313, 1939.
PROTEST: Interest is allowable on recovery of sales taxes paid under protest. Standard Oil Co. v. Michigan, 283 Mich. 85.

Remittances; ultimate payment in cash. Sec. 10. Remittances. All remittances of taxes imposed by this act shall be made to the board by bank draft, check, cashier's check, money order, certificate of deposit or money. The board shall issue its receipt, and shall forthwith deposit all moneys received in the state treasury where it shall be credited as in this act provided: *Provided,* That no remittance other than cash shall be a final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash.

Failure to make return; assessment of tax; penalty. Sec. 11. Failure to make return. If any person fail or refuse to file a return, the board shall proceed to assess the tax against such person and shall notify him of the amount thereof. Such tax shall become due and payable, together with 25 per cent of the tax as a penalty, after notice and hearing as hereinafter provided.

As soon as possible after procuring such information, the board shall proceed to assess the tax and penalty against such person, and shall notify him of the amount thereof. Such tax and penalty shall become due and payable after notice and hearing as hereinafter provided.

In case of failure or refusal to file a remittance with any return required by this act, within the time prescribed by this act or prescribed by the board in pursuance of the provisions of this act, 10 per cent of the tax shall be added as a penalty: *Provided,* That when a return or remittance is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to wilful neglect, no such addition shall be made to the tax. The amount so added shall be collected as a part of the tax: *Provided further, however,* That the state board of tax administration shall at no time have the power or authority to cancel or diminish any part of the specific tax imposed under the provisions of Act No. 167 of the Public Acts of 1933, with the exception of the penalties provided for in this section.

Am. Act 313, 1939.

Tax debt due state; collection. Sec. 12. Tax debt due state; collection. (a) If the tax imposed by this act is not paid on the date the same is required to be paid under the provisions of this act, the board, or some person designated by it, may cause a demand to be made on the taxpayer for the payment thereof. If such tax remains unpaid for 10 days after such demand has been made and no proceedings have been taken to review the same, the board may issue a warrant under the official seal of its office, directed to the sheriff of any county of the state or to any state officer authorized to serve process, commanding said sheriff or other officer to levy upon and sell the property of the taxpayer, used in connection with the business for the privilege of doing which the tax is levied, found within his jurisdiction, for the payment of the amount thereof with the added penalties, interest and the cost of executing the warrant. Such warrant shall be returned to the board together with the money collected by virtue thereof within the time therein specified, which shall not be less than 20 nor more than 90 days from the date of the warrant. The sheriff or other officer to whom such warrant shall be directed shall proceed upon the same in all respects and with like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments by a court of record, and

shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. The state of Michigan, through the board or some officer or agent designated by it, is hereby authorized to bid for and purchase any property sold under the provisions hereof.

(b) In addition to the mode of collection provided herein, the board may bring an action at law in the county in which the business or any part thereof is carried on, to collect and recover the amount of taxes, interest and/or penalties due from any taxpayer.

Tax lien; priority; sale of business, liability of purchaser. Sec. 13. Tax lien; sale of business. The specific tax herein imposed in addition to the interest and penalties provided in sections 9 and 11 hereof, and costs that may accrue in addition thereto, shall be a lien in favor of the state against all property and rights of property, both real and personal, then owned or afterwards acquired by any person or persons, firm, association or corporation, liable therefor, to secure the payment of such tax, interest, penalties and costs, which lien shall attach to the property from and after the date that any report upon which the specific tax is computed is required by this act to be filed. Such lien shall take precedence over all other liens and incumbrances whatsoever, except the lien provided by law for property taxes. In the event that the proceeds of the property levied upon and sold under the provisions of section 12 shall be insufficient to pay in full the lien established by this act together with other tax liens, the net proceeds recovered shall be applied pro rata to the satisfaction of all such tax liens.

If any person liable for a tax levied hereunder shall sell out his business or stock of goods or shall quit the business, such person shall make a final return within 15 days after the date of selling or quitting business. His successor or succeeding successors, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no taxes are due. If the purchaser or succeeding purchasers of a business or stock of goods shall fail to withhold purchase money as above provided, he or they shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by the former owner.

Am. Act 313, 1939.

Jeopardy assessment. Sec. 14. Jeopardy assessment. If the board finds that a person liable for tax under any provisions of this act designs quickly to depart from the state or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect such tax unless such proceedings be brought without delay, the board shall cause notice of such finding to be given such person, together with a demand for an immediate return and immediate payment of such tax. Warrant may issue immediately upon issuance of such jeopardy assessments. Thereupon such tax shall become immediately due and payable. If such person (1) is not in default in making any return or paying any tax prescribed by this act, and (2) furnishes evidence satisfactory to the board under regulations to be prescribed

by the board, that he will duly return and pay the tax to which the board's finding relates, then such tax shall not be payable prior to the time otherwise fixed for payment.

Am. Act 313, 1939.

Corporation; dissolution, withdrawal. Sec. 15. Corporation; dissolution, withdrawal. The secretary of state shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this state or organized under the laws of another state and admitted to do business in this state until the receipt of a notice from the board to the effect that all taxes levied under this act against any such corporation have been paid, or until he shall be notified by the board that the applicant is not indebted for any taxes levied hereunder.

Injunction for failure to pay tax or obtain license. Sec. 16. Failure to obtain license or pay tax; injunction. Any person against whom a tax shall be assessed as herein provided may be restrained and enjoined by proper proceedings instituted in the name of the state of Michigan, brought by the attorney general at the request of the board, from engaging and/or continuing in a business for which a privilege tax is required by the provisions of this act, until such tax shall have been paid, and/or license secured, and until such person shall have complied with the provisions of this act.

Records and special returns. Sec. 17. Records and special returns. Every person liable to any tax imposed by this act, shall keep accurate records, render under oath such statements, make such returns, and comply with such rules and regulations, as the board may, from time to time, prescribe. Such records must be kept for the period as stated in section 9 hereof. Whenever in the judgment of the board it is necessary, it may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the board deems sufficient to show whether or not such person is liable to tax under this act.

Am. Act 313, 1939.

Examination of records and witnesses; subpoena, contempt. Sec. 18. Examination of records and witnesses; subpoena. The board may by itself, or its duly appointed agents, examine the books, records and papers of any person subject to taxation under this act. Any member of the board may issue a subpoena requiring any person to appear before the board or its duly designated and authorized agents and be examined with reference to any matter within the scope of the inquiry or investigation being conducted by the board and to produce any books, records or papers. Any member of the board, or any deputy, referee or examiner thereof, may administer an oath to a witness in any matter before the board. In case of disobedience of a subpoena, the board or any party to a proceeding before the board may invoke the aid of any circuit court of the state of Michigan in requiring the attendance and testimony of witnesses and the production of books, papers and documents. And any of the circuit courts of the state within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena, issue an order requiring such person to appear before said

board and to produce books and papers if so ordered and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Am. Act. 313, 1939.

Testimony; incriminating answers; immunity. Sec. 19. Testimony; immunity. No person shall be excused from testifying or from producing any books, papers, records or memoranda in any investigation, or upon any hearing, when ordered to do so by the board or its duly designated and authorized agents, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a criminal penalty; but no person shall be prosecuted or subjected to any criminal penalty for, or on account of, any transaction made or thing concerning which he may testify or produce evidence, documentary or otherwise, before the board, or its agent. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Am. Act 313, 1939.

Reports; statistics; confidential information. Sec. 20. Reports; confidential information. The board shall publish annually a report containing its rulings and orders and it shall include such statistical information of a general character as it may deem of general interest. Unless in accordance with a judicial order, or as shall be required in the proper administration of this act, no member of the board, or agent or employee thereof, or former member, agent or employee, shall divulge any facts or information obtained in connection with the administration of this act.

State board of tax administration; membership, managing director; assistants, employes, compensation, expenses. Sec. 21. Administration and enforcement by state board of tax administration. There is hereby created a board to be known as the state board of tax administration, and herein called "the board," whose duty it shall be to administer and provide for the enforcement of all the provisions of this act, and shall have power to make rules and regulations for the enforcement of the provisions of this act and the imposition and collection of the tax provided for herein. The board shall consist of 4 members who shall be the state treasurer, the auditor general, the secretary of state, and a fourth member who shall serve as the managing director of the board. The managing director shall be appointed by the governor, by and with the consent of the senate, for a term of 2 years. He shall devote his entire time to the business of the board and shall be responsible for the administration of the provisions of this act. The members of the board shall serve without compensation, except the managing director whose salary shall be fixed by the legislature. The board may employ such assistants, clerks, stenographers or other employees and incur such other expense as it shall deem necessary to carry out the provisions of this act. Such employees shall receive such compensation as shall be fixed by the state board of tax administration and provided for by legislative appropriation. The members of the board, and its duly authorized agents, shall be entitled to receive their necessary traveling expenses in carrying out the administration of this act. Such compensation and expenses shall be

paid in the same manner as is provided by law in the case of other state officers and employees.

Am. Act 71, 1935.

Appeal; correction of assessment; injunction. Sec. 22. Appeal; correction of assessment; injunction. If the board after examining the return of any taxpayer determines that the taxpayer is indebted to the state by reason of deficiency of the remittance accompanying such return, the board shall give such taxpayer notice of the intention to levy such deficiency. Such taxpayer may, if he so desires and serves notice thereof upon the board within 20 days, demand a hearing on the question of the levy of such deficiency. Thereupon the board shall set a time and place for hearing and shall give the taxpayer reasonable notice thereof.

The taxpayer shall be entitled to appear before the board and be represented by counsel and present testimony and argument. After the hearing the board shall render its decision in writing and, by order, levy any deficiency found by it to be due and payable.

If any taxpayer is aggrieved by any decision of the board, he shall be required to pay the amount of taxes, interest and/or penalties found due by the board and shall be permitted to bring an action in the circuit court in the county in which the business for the privilege of doing which the tax is levied is carried on, to recover the amount of the taxes alleged to have been unlawfully levied upon him. Such action shall be conducted in accordance with the statutes and rules of procedure concerning actions at law.

In the event any taxpayer is found entitled to recover any sums paid pursuant to the orders of the board as hereinbefore provided, such sums shall be paid from the general fund of the state on order of the board and warrant of the auditor general.

No injunction shall issue to stay proceedings for assessment or collection of any taxes levied under this act.

Advertising; reimbursement. Sec. 23. Advertising; reimbursement. No person engaged in the business of selling tangible personal property at retail shall advertise or hold out to the public in any manner, directly or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from reimbursing himself by adding to his sale price any tax levied hereunder.

Offenses; penalties; suspension of licenses. Sec. 24. Offenses; penalties. It shall be unlawful for any person to refuse to make the return required by this act; or to make any false or fraudulent return or false statement in any return, with intent to defraud the state or to evade the payment of the tax, or any part thereof, imposed by this act; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this act; or for the president, vice-president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required in this act, with the intent to evade the payment of any tax hereunder. Any person violating any of the provisions of this act shall be guilty of a misdemeanor and, on conviction thereof, shall be fined not more than $1,000.00 or imprisoned not exceeding 1 year in the county jail or punished by both fine and imprisonment, at the dis

cretion of the court. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent return, or any return containing any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law. Any person for whom a false return, or a return containing a false statement as aforesaid shall be made, shall be guilty of a misdemeanor and may be punished by a fine of not more than $1,000.00.

Any person who shall engage in any business in this state which is taxable under this act and who shall fail to secure from the board a license to engage in such business, as required in this act, or who shall continue to engage in business after his license so to do shall have expired or have been suspended by the board, with intent to defraud the state, shall be guilty of a misdemeanor, the punishment for which shall be a fine of not more than $1,000.00 or imprisonment for not more than 1 year, or both such fine and imprisonment.

The board shall have power, after hearing, to suspend the license of any person who shall violate or fail to comply with any provisions of this act or any rule or regulation adopted by the board pursuant thereto. The board shall have power to restore licenses after suspension. If any person shall engage in business taxable under this act while his license is in suspension, the tax imposed with respect thereto shall nevertheless be imposed and be payable with respect to such business.

Receipts, disposition. Sec. 25. All sums of money received and collected under the provisions of this act shall be deposited by the board in the state treasury to the credit of the general fund, to be disbursed only on an appropriation or appropriations by the legislature.

Am. Act 77, 1935.

General fund; appropriation. Sec. 26. Appropriation. There is hereby appropriated from the general fund of the state, from moneys not otherwise appropriated, the sum of $100,000.00 for the purpose of carrying out the administration of this act. The general fund shall be reimbursed for such appropriation from moneys received and collected under the provisions of this act.

Severing clause. Sec. 27. Severing clause. Each section of this act and each subsection, sentence, clause and phrase of this act, is hereby declared to be independently operative, and if any section, sub-section, sentence, clause or phrase of this act shall be declared invalid by any court of competent jurisdiction, it shall not affect or invalidate the remainder of this act.

NOTE: Act 77, 1935, and Act 313, 1939, contained severing clauses.

Short title. Sec. 28. This act may be cited as the "general Sales Tax Act."

[Section 2, Act 302, 1915.]

§ 4633 Motor vehicle law; application for registration; contents; commercial vehicle defined. Sec. 2. (A) Every owner desiring to operate a motor vehicle upon the public highways of this state, except as otherwise provided, shall file an application with the secretary of state stating the owner's name, residence, address, the name of the motor vehicle, its weight

fully equipped, style, factory and motor number, and such other information as the secretary of state shall require. Each application for a commercial vehicle shall also have attached thereto scale weight receipt of said motor vehicle fully equipped as of the time the application is made. Every application for registration shall be accompanied by the certificate of title pertaining thereto, showing ownership in the person applying for registration at the time of the application, as provided in Act No. 46 of the Public Acts of 1921. The term "commercial vehicle" as used in this act shall mean and include all motor vehicles used for the transportation of passengers for hire and those constructed or used for transportation of goods, wares or merchandise.

Same; retail sales; application for title, statement of sales tax due, form; exemption; duties of secretary of state. (B) Every dealer in new and/or second hand motor vehicles in this state, selling motor vehicles at retail as defined by Act No. 167 of the Public Acts of 1933, as amended, shall before delivering any motor vehicle to the purchaser make application to the secretary of state for a new title and secure license plates for said motor vehicle in the name of the purchaser, and shall also, in the case of the sale of motor vehicles already registered, make application at once for a new title and secure, within 5 days from date of delivery of such motor vehicle, from the secretary of state a certificate of registration issued thereon in the name of the purchaser. The dealer shall automatically forfeit his license to sell automobiles if he fails to secure such certificate of registration within the 5 days herein provided, and the secretary of state shall enforce this provision. The purchasers of motor vehicles shall sign the applications and other necessary papers to enable such dealers to secure such title, license plates and transfers thereof from the secretary of state.

Every application for registration, or for a transfer of the license, of said motor vehicles shall also be accompanied by a statement showing the amount of the sales tax due upon the sale of such motor vehicles, on a form prescribed by the state board of tax administration, together with the amount of the sales tax due upon such sale under the provisions of Act No. 167 of the Public Acts of 1933, as amended, except that when the sale of any such motor vehicle is exempt by law from the payment of the sales tax no such tax shall be paid. The statement herein required shall be in triplicate, 1 copy to be retained by the dealer and 1 copy to be delivered to the purchaser and shall be in lieu of the statement required to be filed with the secretary of state by section 14 of Act No. 46 of the Public Acts of 1921, as amended.

It shall be the duty of the secretary of state to forthwith transmit such statement and the funds covering the payment of the sales tax to the state board of tax administration. The secretary of state shall not issue a title, license plates or transfers thereof on any motor vehicles sold by such dealers until the provisions hereof with respect to the payment of the sales tax have been complied with. All dealers of new and/or second hand vehicles selling motor vehicles at retail paying the sales tax to the secretary of state as herein provided shall not be required to include the sale of such motor vehicles in their reports to the state board of tax administration nor pay the tax thereon to that board as required by Act No. 167 of the Public Acts of 1933, as amended.

Same; compensation of secretary of state for collection of sales tax. (C) The state board of tax administration shall determine and pay to the secretary of state reasonable compensation for the collection of the sales tax as provided in subsection (B) hereof.

Am. Act 24, 1939.
NOTE. Act 167, 1933, is the act immediately preceding in this pamphlet.
The title of Act 302, 1915, was amended to conform to the amendments contained in Act 24, 1939.

USE TAX ACT

Act 94, 1937, p. 129; Eff. Oct. 29, 1937.

USE TAX ACT

Act 94, 1937, p. 129; Eff. Oct. 29, 1937.

An act to provide for the levy, assessment and collection of a specific excise tax on the storage, use or consumption in this state of tangible personal property; to appropriate the proceeds thereof; and to prescribe penalties for violations of the provisions of this act.

The People of the State of Michigan enact:

Use tax act. Section 1. This act may be cited as the "Use Tax Act".

Definitions. Sec. 2. Words and phrases when used in this act shall be defined as follows:

(a) "Person" means any individual, firm, co-partnership, joint adventure, association, corporation, company, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) "Use" means the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction where possession is given.

(c) "Storage" means any keeping or retention in this state for any purpose after losing its interstate character.

(d) "Seller" means the person from whom a purchase is made and includes every person engaged in this state or elsewhere in the business of selling tangible personal property for storage, use, or other consumption in this state; and when, in the opinion of the board, it is necessary for the efficient administration of this act to regard any salesman, representative, peddler or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates or from whom he obtains tangible personal property, sold by him for storage, use or other consumption in this state, irrespective of whether or not he is making such sales on his own behalf, or on behalf of such dealer, distributor, supervisor, or employer, the board may so regard him and may regard such dealer, distributor, supervisor, or employer as the "seller" for the purpose of this act.

(e) "Purchase" means acquired for a consideration, whether such acquisition was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer shall have been absolute or conditional, and by whatsoever means the same shall have been effected; and whether such consideration be a price or rental in money, or by way of exchange or barter.

(f) "Price" means the aggregate value in money of anything, or things, paid or delivered, or promised to be paid or delivered by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property shall have been purchased for storage, use or other consumption in this state, without any deduction therefrom on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever. The tax collected by the seller from the con-

sumer under the provisions of this act shall not be considered as a part of the price, but shall be considered as a tax collection for the benefit of the state, and no person other than the state shall derive any benefit from the collection or payment of such tax.

(g) "Consumer" means the person who shall have purchased tangible personal property for storage, use or other consumption in this state.

(h) "Business" means all activities engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

(i) "Board" means the state board of tax administration as created by Act No. 167 of the Public Acts of 1933 as amended.

3 per cent tax for privilege of using, storing or consuming tangible personal property; effective date. Sec. 3. There is hereby levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing or consuming tangible personal property in this state after June 30, 1937, which tax shall be equal to 3 per cent of the price of such property. For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that tangible personal property purchased on or after June 30, 1937 by any person for delivery in this state is purchased for storage, use or other consumption in this state.

Exemptions. Sec. 4. The tax hereby levied shall not apply to:

(a) Property the sale of which in this state has been subjected to the tax imposed by Act No. 167 of the Public Acts of 1933 as amended.

(b) Property, the storage, use, or other consumption of which, this state is prohibited from taxing under the constitution, or laws of the United States, or under the constitution of this state.

(c) Property purchased from a seller who is not engaged in the business of selling tangible personal property.

(d) Property not purchased at retail sale.

(e) Property which is brought into this state by a non-resident thereof for his own storage, use or consumption while temporarily within this state.

(f) Property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this act under the law of any other state of the United States: *Provided,* That if the sale or use of property has already been subjected to a tax under the law of any other state in an amount less than the tax imposed by this act, the provisions of this act shall apply, but at a rate measured by the difference only between the rate herein provided and the rate by which the previous tax was computed.

(g) Property sold to a buyer for consumption or use in industrial processing or agricultural producing.

(h) The sale of commercial advertising when produced upon special order of the purchaser.

(i) Property sold to the United States, the state of Michigan, its departments or institutions, or any of its subdivisions.

(j) Property sold to regularly organized churches or organizations for religious worship, schools, educational institutions, incorporated benevolent, charitable and scientific institutions of learning, or incorporated homes for the care and maintenance of children, none of which organizations shall be operated for profit.

(k) Property purchased for use in the state of Michigan where actual personal possession is obtained outside of the state of Michigan, the purchase price or actual value of which does not exceed $10.00 during any 1 calendar month.

Registration requirements, exceptions; sellers' duty to collect tax; authority of board. Sec. 5. Every seller of tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state, shall, within 30 days after the effective date of this act, register with the board and give the name and address of each agent operating in this state, the location of any and all distribution or sales houses or offices, or other places of business in this state and such other information as the board may require with respect to matters pertinent to the enforcement of this act: *Provided,* That it shall not be necessary for a seller, holding a license obtained pursuant to the provisions of Act No. 167 of the Public Acts of 1933 as amended, to register with the board as provided in this act. Every such seller shall collect the tax imposed by this act from the consumer and the board may, by rule or regulation, authorize any other seller to collect such tax from the consumer, and such rule or regulation shall require that each such seller shall register with the board in such form as may be therein provided.

Monthly return, contents; payment. Sec. 6. Every person storing, using or consuming tangible personal property, the storage, use or consumption of which is subject to the tax imposed by this act, when such tax was not paid to a seller, and every seller collecting such tax from the purchaser, shall, on or before the fifteenth day of each calendar month file with the board a return for the preceding calendar month in such form as may be prescribed by the board, showing the price of each such purchase of tangible personal property during such preceding month, and such other information as the board may deem necessary for the proper administration of this act. At the same time each such person shall pay to the board the amount of tax imposed by this act with respect to the purchases covered by such return. Returns shall be signed by the person liable for the tax, or his duly authorized agent and shall be verified under oath.

Liability of consumer for tax. Sec. 7. Each consumer storing, using or otherwise consuming in this state tangible personal property purchased for such purpose or purposes shall be liable for the tax imposed by this act, and such liability shall not be extinguished until the tax has been paid to the board. The payment to the board of the tax, interest and any penalty assessed by the board shall relieve the seller, who sold the property with regard to the storing, use or other consumption on which the tax was paid from the payment of the amount of the tax which he may be required under this act to collect from the purchaser.

Remittances; ultimate payment in cash. Sec. 8. All remittances of taxes imposed by this act shall be made to the board by bank draft, check, cashier's check, money order, certificate of deposit or money: *Provided,* That no remittance other than money shall be a final discharge of liability for the tax unless and until it has been paid in money. The board shall issue its receipt to each taxpayer.

Personal liability of seller for failure to collect tax. Sec. 9. In case any seller who is required or authorized to collect the tax fails to do so,

he shall be liable personally for such amount as he failed to collect. In such case, the board shall have power to make an assessment against such seller, based upon any information in, or which shall come into its possession. The board shall give to the seller written notice of such assessment. Such notice may be served upon the seller personally or by registered mail.

Failure to make return; assessment, written notice. Sec. 10. If any person required by this act to make a return neglects or refuses to make such return at the time required by or under authority of this act, the board shall have power to make an assessment against such person, based upon any information in, or which shall come into its possession. The board shall give to such person written notice of such assessment. Such notice may be served upon such person personally or by registered mail.

Penalty added to assessment, amount; petition objecting, hearing. Sec. 11. Any amount assessed by the board under the provisions of either of the 2 preceding sections, together with a penalty of 25 per cent thereof, shall be due and payable from the person against whom the assessment has been made to the board 15 days after the service upon such person of notice of such assessment. Unless the person to whom such notice of assessment is directed shall within 15 days after service thereof file a petition in writing, verified under oath by said person, or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of said assessment objected to, together with the reason for such objections, said assessment shall become and be deemed conclusive and the amount thereof shall be due and payable from the person so assessed to the board. In every case where a petition for re-assessment as above described shall be filed, the board shall assign a time and place for the hearing thereof and shall notify the petitioner thereof by registered mail, but the board shall have the power to continue the hearing from time to time as may be necessary.

Demand on taxpayer for payment; warrant, sale of property; authority of state to bid at sale. Sec. 12. If the tax imposed by this act is not paid on the date the same is required to be paid under the provisions of this act, the board, or some person designated by it, may cause a demand to be made on the taxpayer for the payment thereof. If such tax remains unpaid for 10 days after such demand has been made and no proceedings have been taken to review the same, the board may issue a warrant under the official seal of its office, directed to the sheriff of any county of the state or to any state officer authorized to serve process, commanding said sheriff or other officer to levy upon and sell the property of the taxpayer, found within his jurisdiction, for the payment of the amount thereof with the added penalties, interest and the cost of executing the warrant. Such warrant shall be returned to the board together with the money collected by virtue thereof within the time therein specified, which shall not be less than 20 nor more than 90 days from the date of the warrant. The sheriff or other officer to whom such warrant shall be directed shall proceed upon the same in all respects and with like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments by a court of record, and shall be entitled to the same fees for his services in executing the warrant to be collected in the same manner. The state of Michigan,

through the board or some officer or agent designated by it, is hereby authorized to bid for and purchase any property sold under the provisions hereof.

Authority of board to bring action at law. Sec. 13. The board may bring an action at law to collect and recover the amount of taxes, interest and/or penalties due from any person, in addition to the other methods of collections herein provided.

Requirements as to keeping of records, receipts, invoices, etc.; inspection. Sec. 14. Every seller and every person storing, using or otherwise consuming in this state tangible personal property subject to the tax imposed by this act shall keep such records, receipts, invoices, bills-of-lading and such other pertinent documents in such form as the board may require. Such records and other documents shall be open at any time during business hours to the inspection of the board, and shall be preserved for a period of 3 years, unless the board shall, in writing, consent to their destruction within that period, or by order require that they be kept longer.

Penalty; failure to register. Sec. 15. Any seller who fails to register with the board as required under this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined the sum of $25.00 for each day such failure, neglect or refusal to so register continues after notice to such seller from the board that he is required to register under this act.

Same; violation of act or rules. Sec. 16. Any seller who fails, neglects or refuses to collect the full and exact tax as required by this act, or fails, neglects or refuses to comply with the provisions of this act or the rules and regulations of the board, or excepting as expressly authorized pursuant to this act, refunds, remits, or rebates to a consumer, either directly or indirectly and by whatsoever means, all or any part of the tax levied by this act, or makes in any form of advertising, verbal or otherwise, any statements which might imply he is absorbing the tax or paying the tax for the consumer by an adjustment of prices or at a price including the tax, or in any other manner whatsoever shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than $100.00, nor more than $500.00 and upon conviction for a second or subsequent offense shall be fined not less than $500.00 nor more than $5,000.00 or imprisoned in the county jail not more than 1 year, or by both such fine and imprisonment in the discretion of the court.

Same; failure to make, or false return. Sec. 17. Any person who refuses to make any return required under this act or who makes any false or fraudulent return or false statement in any return, with intent to defraud the payment of the tax or any part thereof imposed by this act, or who aids or abets another in any attempt to evade the payment of the tax or any part thereof as imposed by this act, or any president, vice-president, secretary or treasurer of any company who makes or permits to be made for any company or association any false return or any false statement in any return required in this act, with the intent to evade the payment of any tax hereunder, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than $100.00, nor more than $500.00 and upon conviction for a second or subsequent

offense shall be fined not less than $500.00 nor more than $5,000.00 or imprisoned in the county jail not more than 1 year, or by both such fine and imprisonment in the discretion of the court. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent return, or any return containing any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law. Any person for whom a false return, or a return containing a false statement as aforesaid shall be made, shall be guilty of a misdemeanor and may be punished by a fine of not more than $5,000.00.

Same; failure to pay tax; violation of act or rules; false certificate. Sec. 18. Any consumer who refuses to pay the full and exact tax as required by this act, or refuses to comply with the provisions of this act or the rules and regulations of the board, or presents to the seller a false certificate indicating that the storage, use or consumption is not subject to the tax herein imposed, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $100.00, nor more than $500.00, and upon conviction for a second or subsequent offense, shall be fined not less than $500.00 nor more than $5,000.00, or imprisoned in the county jail not more than 1 year, or by both such fine and imprisonment in the discretion of the court.

Same; in general. Sec. 19. Any person who violates any provisions of this act, for the violation of which no penalty is provided by law, shall be fined not less than $25.00 nor more than $100.00.

Rules and regulations; employes, compensation. Sec. 20. The board shall have power to make rules and regulations for the enforcement of the provisions of this act, and the imposition and collection of the tax. The board may employ such assistants, clerks, stenographers or other employes and incur such other expense as it shall deem necessary to carry out the provisions of this act. Such employes shall receive such compensation as shall be fixed by the board and provided for by legislative appropriation.

Deposit of receipts in state treasury. Sec. 21. All monies received and collected under the provisions of this act shall be deposited by the board, not later than 30 days after the receipt thereof, in the state treasury to the credit of the general fund, to be disbursed only by appropriations by the legislature.

Severing clause. Sec. 22. Each section of this act and each subsection, sentence, clause and phrase of this act, is hereby declared to be independently operative, and if any section, subsection, sentence, clause or phrase of this act shall be declared invalid by any court of competent jurisdiction, it shall not affect or invalidate the remainder of this act.

Attorney general in opinion dated July 7, 1937, ruled the above act not effective until October 29, 1937, and then cannot legally operate retrospectively.

ACT 43 OF 1939

An Act authorizing the collection of a Use Tax on motor vehicles purchased outside the state of Michigan.

Sec. 2a. Whenever it shall appear that the motor vehicle was purchased by the applicant in any state other than Michigan, unless the applicant produces a certificate of title duly issued to him under the laws of such state, or certificate of registration or registered bill of sale under the provisions of the laws of such states showing applicant for Michigan certificate of title to have been resident of the state which has issued such certificate of title, registration, or registered bill of sale, it shall be the duty of the secretary of state to conduct an investigation of said purchase and sale and of the title to said motor vehicle. The secretary of state, if satisfied that the applicant is the owner of such motor vehicle, or otherwise entitled to have the same registered in his name, shall thereupon issue to the applicant an appropriate certificate of title in accordance with section 2 of the act: *Provided,* That before the secretary of state shall issue such a certificate of title, the applicant shall attach to his application a statement showing the amount of use tax due upon the motor vehicle described in the application on a form prescribed by the state board of tax administration, together with the amount of the use tax due upon such motor vehicle, under the provisions of Act No. 94 of the Public Acts of 1937, except that when such motor vehicle is exempt by law from the payment of use tax, no such tax shall be paid.

It shall be the duty of the secretary of state to forthwith transmit such statement and the funds covering the payment of the use tax to the state board of tax administration. The secretary of state shall not issue a certificate of title on any such motor vehicles until the provisions hereof with respect to the payment of the use tax have been complied with. All owners of motor vehicles purchased without the state of Michigan who shall have paid the use tax to the secretary of state, as herein provided, shall not be required to comply with sections 6, 7 and 8 of Act No. 94 of the Public Acts of 1937 of the state of Michigan.

Am. Act 43, 1939.
The title of Act 46, 1921, was amended to conform to the amendments contained in Act 43, 1939.

APPENDIX 'A' [(3)]

Act No. 327, § 94, Mich. Pub. Acts 1931, known as the Michigan 'General Corporation Act' [Mich. Stat. Ann., § 21.95].

Sec. 94. When such corporation has fully complied with the provisions of this act, the secretary of state may issue to such corporation a certificate of authority to carry on such business in this state for one (1) year, and from year to year thereafter during the period of its corporate existence so long as such corporation continues to pay its privilege fee and to otherwise comply with the laws of this state: *Provided,* That no such foreign corporation shall be permitted to transact business in this state, unless it be incorporated in whole or in part for the purpose or object for which a corporation may be formed under the laws of this state, and then only for such purpose or object. The secretary of state shall in the certificate which he issues state the act containing such purposes, and such corporation shall have all the powers, rights, and privileges and be subject to all the restrictions, requirements and duties granted to or imposed upon corporations organized under such act or section; and the officers and directors of every such corporation shall be subject to all such requirements and duties as are imposed upon officers and directors of domestic corporations organized under such act, and shall be subject to the same penalties and liabilities for failure to perform any duties imposed by such act as are the officers and directors of domestic corporations organized thereunder: *Provided,* That the carrying on in this state by such corporation of business for which it has not been so admitted, or failure to comply in any way

with the requirements of the laws of this state shall be sufficient cause for revoking the certificate of authority to do business in this state, and the secretary of state may revoke such certificate and shall promptly notify such corporation of such revocation and the reasons therefor by notice sent by mail to the principal office of such corporation in this state. All foreign corporations, including also common carriers, heretofore or hereafter admitted to this state shall be deemed to be admitted under and be subject to the provisions of this act: *Provided*, That nothing in this act contained shall be construed as exempting any foreign corporation from complying with any law bringing it under the jurisdiction of the public utilities commission or other public body or officer of this state for any purpose. In the event of the withdrawal from the state of a foreign corporation a notice shall be filed with the secretary of state of this state, signed by a majority of its last board of directors, within sixty (60) days after the date of such withdrawal certifying that the said corporation has withdrawn from this state and asking that it be relieved from filing further reports or paying any further privilege fees, and upon the filing of such notice and the payment of the fee of five (5) dollars in connection therewith, the said corporation shall be deemed to have withdrawn from this state. Every foreign corporation admitted to do business in this state which shall amend its articles shall file with the secretary of state of this state a copy of such amendment, certified by the proper officer of the state where such corporation shall have been incorporated, within thirty (30) days after the time such amendment becomes effective, and failure to file such certified copy shall subject such corporation to the penalties provided in section ninety-five (95) of this act.

APPENDIX 'B'

Opinion of Michigan Supreme Court in companion causes [*Banner Laundering Co., et al, v. State Board of Tax Administration*, 297 Mich. 419, 298 N.W. 73].

NORTH, J. In each of these three cases, simultaneously submitted to the trial court, the constitutionality of the use tax act (Act No. 94, Pub. Acts 1937 [Comp. Laws Supp. 1940, § 3663-41 *et seq.*, Stat. Ann. 1940 Cum. Supp. § 7.555 (1) *et seq.*]) is challenged. In each case the plaintiff seeks injunctive relief and a declaratory decree holding the act unconstitutional. The particular grounds upon which the plaintiffs assert unconstitutionality of the act will be hereinafter noted; and the pertinent portions of the statute are printed in the margin hereof.* [Omitted in printing]. In the circuit court a decree was entered in each case sustaining the constitutionality of the act. Plaintiffs have appealed.

At the outset there should be noted, at least in general terms, the character of the business of the respective plaintiffs and the circumstances under which each is sought to be subjected to the use tax.

The Banner Laundering Company is a Michigan corporation engaged in the laundry and linen supply business in this State. It purchases cotton and other textile goods and garments, laundry and office supplies, equipment and machinery, for use in its business; and a substantial part of such purchases are made outside of the State of Michigan and in the course of interstate commerce. Its customers consist of restaurants, hotels, bar-

ber shops and others of like nature. It furnishes to these customers clean linens, towels, uniforms, et cetera; and at regular intervals calls for the soiled articles and replaces them with clean articles of like character. The articles so furnished remain at all times the property of plaintiff company.

The Ford Building Company, a Michigan corporation, owns and operates in the city of Detroit two office buildings, the Ford building and the Dime Bank building. Incident to such ownership and operation the plaintiff in this case purchases for its own use and its tenants' use fixtures, equipment and supplies. In part at least such purchases are made outside the State of Michigan and reach this plaintiff in the course of interstate commerce.

Plaintiff Henry H. Sills resides in Detroit. In February, 1938, he purchased at retail in Canada footwear at a price of $10.70. He brought his purchase to Detroit and paid the custom duties thereon. Also in February, 1938, and since that time, he has subscribed to and paid for various magazines and periodicals which have been delivered to him for his own use from without the State in regular course of mail.

Each of these three plaintiffs denies that in consequence of the respective transactions of the character above noted there is a legal liability for the payment of the use tax. The first of plaintiffs' contentions is stated in their brief as follows:

"(1) The statute seeks to impose a tax upon the owners of property. The tax is not a specific tax but is one imposed upon the property and its ownership. The stat-

ute contravenes the provisions of article 10 of the Michigan Constitution (1908)."

The pertinent portions of article 10 read:

"SEC. 3. The legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: *Provided,* That the legislature shall provide by law a uniform rule of taxation for such property as shall be assessed by the State board of assessors, and the rate of taxation on such property shall be the rate which the State board of assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for State, county, township, school and municipal purposes.

"SEC. 4. The legislature may by law impose specific taxes, which shall be uniform upon the classes upon which they operate. * * *

"SEC. 6. Every law which imposes, continues or revives a tax shall distinctly state the tax, and the objects to which it is to be applied. * * *

"SEC. 21. The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half per cent. of the assessed valuation of said property."

We are not in accord with appellants' contention that the statutory use tax is a tax on property, and not a specific tax. If appellants are wrong in the particular just noted, their assertion of invalidity because of lack

of uniformity (Const. 1908, art. 10, § 3) or because the tax exceeds the rate of one and one-half per cent. (Const. 1908, art. 10, § 21) fails.

Fundamentally the issue goes to the character of the tax, rather than to its lack of uniformity or to its excessiveness. Appellants assert the *use tax* is not a *specific* tax, but instead: "This tax is merely a property tax of that nature (on property purchased without and brought within the State), and nothing more;" and further: "The name by which the tax is described in the statute is immaterial. * * * However, this court is not bound by the name given the tax by the legislature; it must inquire into the incidents of the tax, and from these incidents determine its nature."

The argument of appellants in support of their contention is that notwithstanding the nomenclature of the legislature, still the so-called use tax is a tax upon ownership, therefore a property tax. The conclusion appellants reach is that since the act imposes upon them the duty to pay the tax upon certain personal property used, stored or consumed by them, and a like tax is not imposed on similar property owned by them or others, therefore the tax is not uniform and the act is unconstitutional. The fallacy, at least in part, of appellants' reasoning is that they overlook the provisions of the act which confine the tax to a certain type or class of tangible personal property, and further that the act does not fix the amount of the tax on an ad valorem basis. Stated in concise terms and disregarding certain expressed exemptions in the statute, the class or type of property which if used, stored or consumed in this State subjects one to the payment of the tax in question is property on which a sales tax has not been imposed under the terms of Act No. 167, Pub.

Acts 1933, as amended (Comp. Laws Supp. 1940 § 3663-1 *et seq.*, Stat. Ann. 1940 Cum. Supp § 7.521 *et seq.*). It is not a tax imposed upon the use or ownership of all tangible personal property. Instead, one may own, use, store or consume any amount of tangible personal property without being subjected to the use tax, unless such tangible personal property falls within the specific type or class designated in the act.

The Constitution of this State (Article 10, §§ 3, 4) plainly empowers the legislature to provide not only for co-called property or ad valorem taxes, but it may also "impose specific taxes, which shall be uniform," upon the class or classes of property subjected thereto. If a valid reason exists for the segregation of the designated class of property to be subjected to a specific tax, the wisdom of so doing is for legislative determination, not for judicial decision. If there is a reasonable basis for selecting the class or classes, the only remaining constitutional limitation bearing upon the validity of specific taxes is that they "shall be uniform upon the classes upon which they operate." There is an obvious and just reason, approximating a necessity, for legislation of the type under consideration. Clearly its purpose is to equalize taxation as between the tangible personal property reached by the sales tax act and tangible personal property to which the use tax is made applicable. Under like circumstances, courts of other States, which have enacted a use tax statute as complementary to their sales tax systems, have held that the use tax is an excise or privilege tax, not a property tax. *Douglas Aircraft Co., Inc.*, v *Johnson*, 13 Cal. (2d) 545 (90 Pac. [2d] 572); *Vancouver Oil Co.* v. *Henneford*, 183 Wash. 317 (49 Pac. [2d] 14); *Oklahoma Tax Commission* v. *Sisters of the Sorrowful Mother*, 186 Okla. 339 (97 Pac. [2d] 888);

National Linen Service Corp. v. *State Tax Commission,* 237 Ala. 360 (186 South. 478).

While it is true, as appellants urge, that the mere fact the legislature has designated the use tax as "a specific excise tax" is not conclusively binding upon the courts in determining whether in fact and in law the tax is a specific tax or an ordinary property tax, still such designation is entitled to "much weight." *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 145 (31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912 B, 1312). "Such statutory statement is to be accepted as true unless incompatible with the meaning and effect of the act as a whole." *Opinion of the Justices,* 250 Mass. 591, 597 (148 N. E. 889).

For the reasons hereinbefore indicated we conclude that the use tax is an excise tax (as contradistinguished from an ordinary property or ad valorem tax) imposed on the privilege of using (in the statutory sense, see section 2 subd. [b]) tangible personal property which one has caused to become located in this State and which is not within the exemptions provided in the use tax act; and further, we conclude that the tax provided by this statute is uniform in its application to the tangible personal property on which it is imposed. It follows that this excise tax or privilege tax is not subject to the above-quoted article 10, § 21, of the Constitution, because it is not a tax "assessed against property," but instead is a specific tax.

As appellants' second contention, they assert: "The statute is discriminatory in terms and as construed and applied by the defendants." We quote from appellants' brief:

"In short, in terms the statute purports to reach only a very small segment of the whole mass of property, indistinguishable in nature, which is imported into Michigan and which becomes merged with the common mass of property in Michigan, * * * [the statute] is not uniform *per se* or upon the classes upon which it operates. * * *

"But in the stipulation of facts, plaintiffs further offered to prove 'that as [the use tax act] is construed and applied by the defendants, it imposes a tax upon Michigan merchants, manufacturers, processors and persons engaged in business enterprises on account of goods purchased by them, and upon persons doing business in Michigan on account of goods sold by them; but that persons resident in Michigan not engaged in business in that State, using, storing or consuming in Michigan tangible personal property acquired from persons not engaged in business in Michigan, generally make no returns and pay no [use] taxes.' "

Appellants contend the trial court erred in refusing to receive testimony bearing upon their contention just above noted. We are in accord with the ruling of the trial court. If the use tax act as passed by the legislature has no inherent defects, and is not being administered in an unlawful manner as against appellants, they are not entitled to have the act decreed unconstitutional or to have its enforcement as against them enjoined. In none of the three bills of complaint included in the record is there a sufficiently specific or definite allegation of maladministration of the act by the defendants to make that an issue in the cases being reviewed.

In support of their contention that the use tax act "is discriminatory in terms," appellants advert to the fact

that the act in section 4 provides numerous exemptions, including the following: (1) Property merged into the common mass which was not acquired *at retail sale* in the State of purchase, (2) property upon which a retail sales tax was paid in the State of purchase, (3) a great mass of property which, after merger, is devoted to industrial processing, to agricultural producing, or to be resold. But nowhere in appellants' brief is it persuasively pointed out that the exemptions contained in the statute are not justifiable exemptions, or that in consequence of the exemptions the act is rendered unconstitutional in that it does not operate uniformly or that it deprives appellants or others like situated of due process or equal protection of the law. Instead we think it is plain, at least the contrary is not demonstrated by appellants, that certain of the exemptions contained in the statute are justified by an obvious attempt on the part of the legislature to produce uniformity in the taxation imposed by the use tax act when considered in connection with the closely related sales tax act. Other exemptions contained in section 4 of the act are of a type frequently embodied in taxation statutes, such as property sold to governmental units for public use, property sold to religious organizations, benevolent, charitable, scientific institutions and the like. But exemptions which render the operation of a taxation measure more just and uniform, or save institutions of the character above noted from the burden of the particular tax, do not render the act invalid for lack of uniformity or deprive persons subject to the tax of due process or equal protection of law, and this is true both of a specific tax and of a direct property tax.

While it is not particularly stressed, appellants under this subdivision of their brief note that defendants construe the use tax act as imposing "a tax only upon prop-

erty merged into the common mass after the effective date of the statute." But it is not demonstrated that such construction is adverse to appellants' interests; and whether the construction is right or wrong, it does not render the act unconstitutional.

"A statute is to be treated with that deference due to the deliberate action of a coordinate branch of government and is to be set aside only when it is apparent it was the result of action which the legislature was prohibited by the Constitution from taking." *C. F. Smith Co.* v. *Fitzgerald,* 270 Mich. 659, 667.

In recapitulation of this phase of the appeal it may be said that notwithstanding some imperfection may exist in the administration of the use tax act, or that by reason of exemptions (based on justice and sound public policy) the tax in specified circumstances is not imposed, still enforcement of this statute should not be enjoined nor should it be held constitutionally invalid as lacking uniformity or depriving those subjected to the tax of due process or equal protection of the law, as provided in Michigan Constitution (1908), art. 2, § 16; and United States Constitution, 14th amendment.

In a Federal case involving the Constitution and statutory provisions of Michigan, the supreme court of the United States said:

"It is manifest, therefore, that there are marked differences between the taxed and nontaxed companies, and the differences might be pronounced arbitrary if the rule urged by appellant should be applied, that is, that in the taxation of property no circumstance should be considered but its value, or, to use appellant's words, 'each dol-

lar's worth should be treated alike.' But such rigid equality has not been enforced. In Michigan the legislature has the power of prescribing the subjects of taxation and exemption, notwithstanding the Constitution of the State requires the legislature to provide a uniform rule of taxation, except on property paying specific taxes. *People* v. *Auditor General,* 7 Mich. 84; *Board of Supervisors* v. *Auditor General,* 65 Mich. 408; *National Loan & Investment Co.* v. *City of Detroit,* 136 Mich. 451. The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature. We said in *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92 (21 Sup. Ct. 43, 45 L. Ed. 102), that from time out of mind it has been the policy of this Government to classify for the purpose of taxation. * * *

"Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. *Keeney* v. *Comptroller of New York,* 222 U. S. 525, 536 (32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. [N. S.] 1139). The State is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' See [*Quong Wing* v. *Kirkendall*] 223 U. S. 59, 62, 63 (32 Sup. Ct. 192, 56 L. Ed. 350). Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interests of society require.' " *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 328, 329, 331 (33 Sup. Ct. 833, 57 L. Ed. 1206).

Touching this phase of the law, in one of our earlier decisions it was said:

"Courts cannot annul tax laws because of their operating unequally and unjustly. If they could, they might defeat all taxation whatsoever; for there never yet was a tax law that was not more or less unequal and unjust in its practical workings." *Youngblood* v. *Sexton,* 32 Mich. 406, 414 (20 Am. Rep. 654).

"Exemptions consistent with uniformity.—The principle by which the requirement of equality or uniformity is held to prohibit exemptions from taxation is applied with varying degrees of strictness in the different jurisdictions in which it is in force, but it is nowhere enforced with literal exactness. It is almost everywhere held that the legislature may exempt property devoted to a public or semipublic use, or property of insignificant value and of such a character that it may be supposed to be owned by everyone alike, or property which is already taxed directly or indirectly in some other way. The requirement of uniformity does not compel the State to tax the instrumentalities of government, since such a tax would merely involve the payment by the same hand which was to receive the tax and would be a wholly nugatory act. * * * In most jurisdictions it is held that property devoted to a public use, for instance the property of religious and eleemosynary corporations, may be exempted from taxation, because the State is thereby relieved of a burden which it otherwise would be obliged to bear. * * * Property may be exempted by a State which has the constitutional power to tax it if it is lawfully taxed in another State." 26 R. C. L. §§ 224, 225, pp. 253, 255.

We quote the following from the syllabi of *C. F. Smith Co.* v. *Fitzgerald, supra:*

"What classes of rights of property shall be assessed for taxes and what shall be exempt is a matter for legislative determination within constitutional limitations.

"The State may classify property for purposes of taxation and statutes imposing taxes upon property are not invalid if they operate uniformly against or upon each class or if some classes are exempted altogether."

The case last above cited is authority for holding that notwithstanding property incident to which a use tax is paid may also be subjected to the ordinary ad valorem tax, still this does not result in double taxation. Appellants' contention to the contrary cannot be sustained.

Appellants also challenge the constitutionality of Act No. 94, Pub. Acts 1937, on the ground that the title of the act "does not express its object," and that the act "does not state the nature of the tax and the objects to which it is to be applied." In other words, appellants assert the act is violative of the following provisions of the State Constitution.

"No law shall embrace more than one object, which shall be expressed in its title." Article 5, § 21.

"Every law which imposes, continues or revives a tax shall distinctly state the tax, and the objects to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object." Article 10, § 6.

The title of the act in question reads:

"An act to provide for the levy, assessment and collection of a specific excise tax on the storage, use or consumption in this State of tangible personal property; to appropriate the proceeds thereof; and to prescribe penalties for violations of the provisions of this act."

Tested in the light of our numerous and recent decisions, the title is not defective. See *Loomis* v. *Rogers,* 197 Mich. 265; *In re Lewis' Estate,* 287 Mich. 179; *Baker* v. *State Land Office Board,* 294 Mich. 587; *Shivel* v. *Kent County Treasurer,* 295 Mich. 10. Seventy-five years ago Mr. Justice COOLEY, writing for the court, said:

"There was no design by this clause [Const. 1850, art. 4, § 20; Const. 1908, art. 5, § 21] to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number. * * * But this purpose [compliance with the constitutional provision] is fully accomplished when the law has but one general object, which is fairly indicated by its title. To require that every end and means necessary to the accomplishment of this general object should be provided for by a separate act relating to that alone, would not only be senseless, but would actually render legislation impossible." *People* v. *Mahaney,* 13 Mich. 481, 494, 495.

In refutation of appellants' contention that the act does not state the nature of the tax and the objects to which it is to be applied, it suffices to note that both in the title and in the body of the act the tax is definitely designated "a specific tax," and in section 3 it is provided that it is a specific tax "for the privilege of using, storing or consuming tangible personal property," et cetera; and fur-

ther as to the disposition of taxes paid under the act, section 21 provides: "All moneys received and collected under the provisions of this act shall be deposited * * * in the State treasury to the credit of the general fund."

Appellants further assert that Act No. 94, Pub. Acts 1937, transgresses the following portion of the Federal Constitution: "The congress shall have power * * * (3) To regulate commerce with foreign nations, and among the several States." U. S. Const. art. 1, § 8 (3). This contention is foreclosed by several recent decisions of the supreme court of the United States which are adverse to appellants' contention. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (57 Sup. Ct. 524, 81 L. Ed. 814); *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62 (59 Sup. Ct. 376, 83 L. Ed. 488); *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (59 Sup. Ct. 389, 83 L. Ed. 586); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (60 Sup. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876); *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70 (60 Sup. Ct. 404, 84 L. Ed. 584). In the *Henneford Case, supra,* pp. 582, 583, the court said:

"The tax (California use tax) is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the State of destination. * * * For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. * * * A tax upon the privilege of use or storage when the chattel used or stored has ceased

to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

We have considered other arguments and cited authorities contained in appellants' brief, but we find they do not sustain appellants' contention of invalidity of the act here involved. Instead, as against any of the reasons urged by appellants, we hold the act constitutional and in that respect affirm the declaratory decree entered in the circuit court. Since the foregoing opinion was written, two decisions in accord therewith have been rendered by the United States supreme court. See *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359 (61 Sup. Ct. 586, 85 L. Ed.—, 132 A. L. R. 475); and *Nelson* v. *Montgomery, Ward & Co.*, 312 U. S. 373 (61 Sup. Ct. 593, 85 L. Ed.—).

A public question being involved, no costs are awarded.

SHARPE, C. J., and BUSHNELL, BOYLES, CHANDLER, and MCALLISTER, JJ., concurred with NORTH, J.

WIEST, J. (*concurring in result*). I concur in holding the act constitutional "as against any of the reasons urged by appellants."

BUTZEL, J., did not sit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 617

VERNON J. BROWN, THEODORE I. FRY, et al., comprising MICHIGAN STATE BOARD OF TAX ADMINISTRATION,
Petitioners,
vs.
J. B. SIMPSON, INC., an Illinois corporation,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTIONAL STATEMENT

The petition for certiorari somewhat obscures the obvious lack of a federal question in this case by its failure scrupulously to observe the provisions of Rule 38, Section 2, and Rule 12, Section 1 of the Rules of this Court with reference to a jurisdictional statement.

Respondent's bill of complaint in the court of first instance (Circuit Court for the County of Wayne, Michigan, in Chancery), alleged that the Michigan Use Tax Act did not by its terms impose any duty or obligation upon respondent; but that, were it otherwise construed and applied, it would contravene the Constitution of the United States (R. 11, 12; ¶s VII, VIII). It prayed for a decree accordingly (R. 15, 16; ¶ (c)). The Trial Judge decreed (R. 58; ¶ 3):

> "The Court finds that the tax imposed by said Act is a valid and constitutional exercise of the taxing power of the State; * * * that said Act No. 94, Public Acts of 1937, does not impose any duty or tax upon this plaintiff (respondent)."

Petitioner appealed to the Michigan Supreme Court from this decree. Petitioner's assignment of error number 1 was as follows (R. 1):

> "The Court erred in holding that Act 94, Public Acts of 1937 does not impose any duty or tax upon J. B. Simpson, Inc."

Respondent cross-appealed, assigning as error the adjudication of the Trial Court that the Use Tax Act was constitutional and valid* (R. 2, 3).

Petitioner's brief in the Michigan Supreme Court stated the issues as follows:

> "This is one of four representative-group cases brought to this court on appeal to test the consti-

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*Section 5 of the Michigan Use Tax is the only section which obligates certain sellers of property to collect the use tax from the buyer. On petitioner's appeal, the single issue was whether J. B. Simpson, Inc., as a seller, came within the class defined by Section 5. One of the petitioner's contentions was that a general definition of terms in Section 2 of the Act took precedence over the limitation of the class of sellers found in Section 5.

tutionality of the Michigan use tax act, and in this particular cause to obtain a judicial construction of certain of its provisions (Act No. 94, Pub. Acts 1937 (Stat. Ann., Cum. Supp., 1939, § 7.555-1, *et seq.*))

"Questions involving the constitutionality of the act will be considered on plaintiff's cross-appeal.

"On appeal of the state board of tax administration, the question for decision is whether plaintiff is engaged in the business of selling tangible personal property at retail in Michigan, within the meaning of the use tax act (Assignment of Error No. 2), and whether the use tax act imposes any duty upon plaintiff (Assignment of Error No. 1)."

Respondent's brief in the Michigan Supreme Court stated the issues as follows:

"The Use Tax Act imposes duties and obligations only upon sellers 'of tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state' (Sec. 5). It has been finally adjudged by this Court that this appellee is not engaged in the business of selling at retail in this state. It therefore follows, as a matter of course, that the Use Tax Act imposes no duty or obligation upon this appellee. This result does not entail consideration of the effect of the commerce clause of the federal constitution."

The opinion of the Michigan Supreme Court held that the provisions of Section 5 of the Use Tax Act were inapplicable to respondent:

"A definition of words and phrases in an act carries no force unless employed in the enactment and cannot be considered in the present instance for the quoted enactment, by its specific terms, only applies to sellers of 'tangible personal property for

storage, use or other consumption in this State, engaged in the business of selling at retail in this State,' and this is manifested by the required registration of such persons under the act, unless registered under the sales tax act * * * (R. 67).

"We find no occasion to touch upon the constitutionality of the act and, as there was none necessary in the circuit court, the part of the decree below holding the act constitutional is eliminated and the question left without decision to await a proper setting" (R. 69).

A dissenting opinion was filed. This dissenting opinion did not pass upon the constitutionality of the Act but upon its construction, the Court saying (R. 72):

"Plaintiff (1) challenges the constitutionality of said act; and (2) claims that if the act is upheld, it does not apply to plaintiff's method of doing business in Michigan. The court below held that the tax imposed by the act is a valid and constitutional exercise of the taxing power of the State, but that it did not impose any duty or tax upon the plaintiff. Defendant State board of tax administration appeals from that part of the decree holding that the use tax act does not impose any duty or tax upon the plaintiff. Plaintiff cross-appeals from that part of the decree holding the act to be constitutional.

"This case is companion to *Banner Laundering Co. v. State Board of Tax Administration,* 297 Mich. 419, decided herewith, wherein the constitutionality of the use tax act is decided and upheld. It remains for us to consider whether the act applies to plaintiff's operations in this State."

NO SUBSTANTIAL FEDERAL QUESTION BEING INVOLVED, THIS COURT IS WITHOUT JURISDICTION

On the facts of this case, it is apparent that the decision of the Michigan Supreme Court rested wholly on a non-federal question, *viz.*, the interpretation to be placed upon Section 5 of the Act. None of the federal questions alleged by petitioner to be presented, are involved. What the Michigan Supreme Court held was that on the facts, respondent was not "engaged in the business of selling at retail in this state" within the meaning of Section 5 of the Michigan Use Tax Act. That is the point upon which issue was framed, and that is the point of decision. The Court itself left no room for doubt, because it specifically modified the Trial Court's decree by eliminating therefrom all decision on the question of constitutionality. Petitioner's position would be without merit if the only case decided by the Michigan Supreme Court on May 21, 1941 had been the case at bar. It is transparently lacking in merit when, on the same day, the Michigan Supreme Court rendered an opinion in companion cases holding the Michigan Use Tax Act constitutional. *Banner Laundering Co. v. State Board of Tax Administration* (appendix B to petition, p. 35).

ARGUMENT

A. As to Jurisdiction.

(1) In order that this Court may have jurisdiction, it must appear affirmatively not only that a federal question was presented for decision, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been rendered without deciding it. *Adams v. Russell,* 229 U. S. 353, 360-361. This Court in such case does not indulge in conjecture as to the result which would have been reached if the federal question had not been raised "and by conjecture acquire jurisdiction to review the judgment" of the state court. *Ibid* 358.

Authorities are reviewed in *Lynch v. New York Ex Rel. Pierson,* 293 U. S. 52, where, after stating the rule, the Court continues (54):

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

(2) It may be, as in the cases relied upon by petitioner, *e. g., Indiana Ex Rel. Anderson v. Brand,* 303 U. S. 95 and *Southern Railway Co. v. Clift,* 260 U. S. 316, that if the State Court had rested its opinion solely upon federal grounds, the mere existence of an unconsidered non-federal question would not *ipso facto* defeat jurisdiction. But in the instant case such rule has no application, for the converse is the fact; the Court expressly refused to pass upon the federal question and rested its decision on the non-federal question.

The principle is stated as follows in *Eustis v. Bolles,* 150 U. S. 361, 366:

> "It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution*, or that the judgment as rendered could not have been given without deciding it (citing cases).
>
> "It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

To the same effect are *McQuade v. Trenton,* 172 U. S. 636; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U. S. 157 (where the Court further observed (164) that "where the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-Federal questions (citing authority)"); *Brown v. Union Pacific Railroad Co.,* 267 U. S. 255; *Fox Film Corp. v. Muller,* 296 U. S. 207; and many other cases cited in those opinions.

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*The Act of 1925 now permits review as well where the federal claim is sustained as where it is denied, but this provision does not weaken the authoritative force of the case on the question here under consideration.

It is apparent that in the case at bar, if the federal question had been passed upon at all (which was not done), the case must be "controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller, supra,* 296 U. S. 207, 210.

There is no longer any doubt that the Michigan Use Tax Act is constitutional. That was settled on May 21, 1941, in the companion case of *Banner Laundering Co. et al. v. State Board of Tax Administration* (appendix B to petition, p. 35), from which no review has been sought. There is likewise no doubt that the state legislature, if it sees fit to do so, may amend Section 5 of the Michigan Use Tax Act by modifying the language upon which respondent relied and which formed the basis for the Michigan Supreme Court's opinion. If and when the statute is so amended, respondent or someone else may seek to raise a federal question concerning it, and in that event, it may become necessary to consider *Felt and Tarrant Mfg. Co. v. Gallagher,* 306 U. S. 62, and the other cases which petitioner cites. But until the statute has been amended and the question of constitutionality has been raised, this Court should not consider it. It is now a moot question. The decisions upon which petitioner relies deal with the constitutionality, not the interpretation of statutes.

B. Conclusiveness of the State Adjudication.

It is too well settled in this Court to admit of controversy that the adjudication by a State Court of last resort on the construction of its own statutes is conclusive. Without indulging in cumulative citations, we refer on this point to *Knop v. Monongahela etc. Co.*, 211 U. S. 485, and *Morehead v. New York Ex Rel. Tipaldo*, 298 U. S. 587.

In the *Knop Case*, the Court had under consideration a statute of Louisiana requiring the gauging of coal boats and barges before sale. The Supreme Court of Louisiana construed the statute to apply exclusively to sales of boat loads or barge loads, and not to apply to sales of a particular number of barrels from a boat or barge. Appellant sought review on the ground that this construction was erroneous; that the statute did apply to sales of barrels from a boat or barge; and that because it applied to broken load sales, it contravened the Federal Constitution. This Court dismissed the appeal for lack of jurisdiction.

In the *Morehead Case*, this Court said (609):

> "There is no blinking the fact that the state court construed the prescribed standard to include cost of living or that petitioner here refuses to accept that construction. Petitioner's contention that the Court of Appeals misconstrued the Act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. *Supreme Lodge, K. P. v. Meyer*, 265 U. S. 30, 32, 68 L. Ed. 885, 887, 44 S. Ct. 432. Exclusive authority to enact carries with it final

> authority to say what the measure means. *Jones v. Prairie Oil & Gas Co.*, 273 U. S. 195, 200, 71 L. Ed. 602, 608, 47 S. Ct. 338."

What petitioner asks this Court to do is to repudiate the construction placed by the Michigan Supreme Court upon the Michigan Statute in the hope that a moot federal question then can be considered.

Petitioner appears to argue that the Michigan Supreme Court gave a wrong ground for its decision, and that it is therefore entitled to a writ of certiorari. But the Michigan Supreme Court did definitely decide that the statute, properly construed and interpreted, did not apply to the facts of the instant case, and that it was unnecessary to consider constitutional questions. The actual decision as to interpretation of the statute is conclusive, irrespective of the reasons given.

In *Helvering v. Gowran,* 302 U. S. 238, 245, this Court decided that "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

Since this Court will not repudiate the State Court's construction and interpretation of Section 5 of the Michigan Use Tax Act, it would affirm upon review, even if certiorari were granted.

SUMMARY

We respectfully submit that the petition should be denied because:

(1) There is no jurisdiction in this Court.

(2) If this Court had jurisdiction, it could not pass upon a federal question in the case at bar; it would be bound by the State Court's interpretation of the State statute; and in the absence of amendment of that statute and further litigation between parties affected by the amendment, the issue of constitutionality would be moot.

Respectfully submitted,

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